TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 34

SEARS, ROEBUCK AND CO., A NEW YORK CORPORATION, PETITIONER,

vs.

BRUCE A. MACKEY, INDIVIDUALLY, AND TIME SAVER TOOLS, INC., AN ILLINOIS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 24, 1955

CERTIORARI GRANTED MARCH 28, 1955

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 53 C 1240

Bruce A. Mackey, Individually and Time Saver Tools, Inc., an Illinois Corporation, Plaintiffs,

vs.

Sears, Roebuck and Co., a New York Corporation, Defendant

Statement Pursuant to Rule 10(b) of the United States Court of Appeals for the Seventh Circuit

The above cause was commenced on May 21, 1953.

The original parties plaintiff were Bruce A. Mackey and Time Saver Tools, Inc., an Illinois corporation.

The original party defendant was Sears, Roebuck & Co., a New York corporation.

No change in parties has taken place since the commencement of this suit.

Defendant's motion to dismiss the complaint was filed on July 13, 1953.

Defendant's amended motion to dismiss the complaint and defendant's answer to Count III of the complaint were filed on December 4, 1953.

The defendant was not arrested; no bail was taken; no property was attached.

On May 19, 1954, the United States District Court entered the order and judgment from which this appeal is taken.

Notice of appeal was filed on June 8, 1954.

Respectfully submitted, (S.) Edward I. Rothschild, John Paul Stevens, Norman J. Barry, Attorneys for Appellants.

[fol. 3] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT—Filed May 21, 1953

Count I

Bruce A. Mackey, Plaintiff, by his attorneys, complains of Sears, Roebuck & Co., a New York corporation, Defendant, as follows:

1. This action arises under Sections 1 and 2 of the Sherman Act (26 Stat. 209, 210, 15 U. S. C. Section 2); Sections 2 (f) and 3 of the Robinson-Patman Act (38 Stat. 730, 49 Stat. 1526-1528, 15 U. S. C. Sections 13 (f) and 13 a) and Sections 3, 4 and 16 of the Clayton Act (38 Stat. 731, 737, 15 U. S. C. Sections 14, 15 and 26).

2. Bruce A Mackey (hereinafter referred to as "Mackey") is a citizen and resident of the State of Illinois.

3. General Metalcraft Corporation, a corporation, was incorporated under the laws of the State of Illinois in March of 1939. On May 11, 1948, said corporation was dissolved. On May 11, 1948, General Metalcraft Company, a corpora-[fol. 4] tion, was incorporated under the laws of the State of Illinois. General Metalcraft Company was the successor in interest to General Metalcraft Corporation. General Metalcraft Company was dissolved in August of 1952. The term "Metalcraft" will be used hereinafter to refer to either or both of said corporations, as may be appropriate. During the corporate existence of Metalcraft, Mackey owned all of its capital stock. As such sole shareholder, Mackey is the owner in liquidation of all of the assets, rights, claims and causes of action formerly owned by Metalcraft.

4. After 1945 Metalcraft was engaged in the business of manufacturing and selling nursery lamps and other gift items. Metalcraft purchased component parts in New York, Wisconsin, Ohio, Kentucky and Illinois, and made them into nursery lamps in Illinois. Such lamps were sold and delivered by Metalcraft to retail stores in other states in all

sections of the United States. Metalcraft was engaged in interstate commerce.

5. Time Saver Tools, Inc., a corporation (hereinafter referred to as "Time Saver"), was incorporated under the laws of the State of Illinois on November 24, 1951. Mackey is the owner of all of Time Saver's capital stock.

6. Time Saver is engaged in the business of manufacturing and selling tools. The tools sold by Time Saver are manufactured in Illinois and delivered by Time Saver to customers throughout the United States. Time Saver is engaged in interstate commerce.

7. Sears, Roebuck & Co., (hereinafter referred to as "Sears"), is a New York corporation, with its principal place of business in Chicago, Illinois. It does business and is found in the Northern District of Illinois.

8. Sears is engaged in the general merchandising retail business. It sells nursery lamps, gift items, tools, juvenile furniture, toys, notions, home furnishings, appliances, housewares and many other items and commodities to consumers. It sells more merchandise to consumers through its mail order facilities than any other corporation in the world, and in addition, operates over 700 retail stores located in all parts of the United States and in several foreign countries. More than a million dollars' worth of merchandise was transported from one state to another [fol. 5] state during each day of 1952 as a result of purchases and sales by Sears. Sears is engaged in interstate commerce.

9. Sears' net sales in the year ended January 31, 1951 were $2,556,371,110.00. Sears' net sales in the year ended January 31, 1952 were $2,657,408,447.00. Sears' net sales in the year ended January 31, 1953 were $2,932,337,701.00. In each of the years 1950, 1951 and 1952 Sears' net sales were the highest in its history. Sears' net sales during the first four months of 1953 were higher than in any other comparable period in its history.

10. The tremendous volume of Sears' purchases and sales gives it the power to ignore normal business considerations, such as the probability of making a profit out of a particular transaction, in determining its policies with respect to purchases or sales of particular products in particular

areas. It has the power, by means of actual or threatened refusals to deal with particular suppliers in particular areas, or by means of actual or threatened sales of particular products in particular areas at unreasonably low prices, substantially to destroy the business and property of its small competitors and small suppliers. Sears has exercised its tremendous power to discipline and punish suppliers who have been unwilling to do business with Sears on terms dictated by Sears. The actions by means of which Sears has disciplined and punished such suppliers have been motivated by a specific intent to injure and destroy such suppliers, to injure and destroy potential competitors of Sears who make purchases from such suppliers, and to deter all suppliers dealing with Sears from resisting demands made of them by Sears. The exercise of Sears' tremendous power for the purpose of destroying the business and property of a supplier or competitor engaged in interstate commerce constitutes an attempt to monopolize a part of the trade or commerce among the several states. Such acts have the purpose and effect of unreasonably restraining competition among suppliers and potential suppliers of Sears and of restraining trade between such suppliers and Sears by causing them to feel that Sears will exercise its power against them in a similar way if they refuse to deal with Sears on terms dictated by Sears.

11. Beginning in 1949 and continuing down to the date of the filing of this complaint, Sears has been engaged in a con- [fol. 6] tinuing attempt to destroy each and every business owned, controlled or managed by Mackey, and thereby to punish Mackey for refusing to deal with Sears on terms dictated by Sears, and to deter others from refusing to deal with Sears on terms dictated by Sears. Sears' destruction and monopolization, and attempted destruction and monopolization, of Mackey's business has included the acts and practices hereinafter alleged.

12. Metalcraft began selling nursery lamps to Sears and others in 1945. In 1946 Sears notified Metalcraft that it would discontinue its purchases from Metalcraft unless Metalcraft refrained from selling nursery lamps to competitors of Sears. Thereafter, until the breach of contract hereinafter alleged, Metalcraft did sell nursery lamps exclusively to Sears.

13. During 1948 and 1949, Sears from time to time failed and refused to carry out its contract obligations to accept delivery and to pay for merchandise ordered from Metalcraft, and demanded extensions of said contracts. As a result of such extensions, Mackey was required to give his personal guarantee of the obligations of Metalcraft.

In the Spring of 1949, when Metalcraft was under contract to supply Sears with 30,000 nursery lamps at a price of $2.20 per lamp, Sears instructed Mackey to cause Metalcraft to agree to a 20% reduction in price, and notified Mackey that if such reduction were refused, Sears would ruin Mackey and Metalcraft and make it impossible for Metalcraft to continue in business.

14. Mackey refused to agree to such a price reduction, or to cause Metalcraft to agree to it. When Sears then refused to take delivery of the nursery lamps which it had contracted to purchase, Mackey, through Metalcraft, attempted to promote the sale of said lamps through department stores in Milwaukee and Detroit. With the specific intent of destroying such promotions and making it impossible for Metalcraft to dispose of its products, Sears sent substantial quantities of lamps which it had previously purchased from Metalcraft for $2.20 a piece to each of said cities, though not to other comparable cities, for sale in its retail stores at 94¢ a piece. At the same time, Sears listed these lamps in two of its catalogs at 84¢ a piece, and obtained a cheap imitation of Metalcraft's lamps which it [fol. 7] misrepresented in its advertising as Metalcraft's lamps and sold to persons ordering from Sears' catalog representation of Metalcraft's lamp. The purpose and intent of said sales below cost, and such misrepresentation and unfair competition, was to destroy the market for Metalcraft's products. The effect of such acts was to make it impossible for Metalcraft to dispose of its inventory of lamps. As a direct result of Sears' acts Metalcraft became insolvent and was dissolved by action of the Attorney General of Illinois on August 8, 1952.

15. On or about September 1, 1951, Mackey promised the Vascoloy-Ramet Corporation (hereinafter referred to as "Vascoloy"), to promote the sale of carbide and tantung tools, tool tips and investment castings, and certain other

products manufactured by Vascoloy, and Vascoloy promised to pay Mackey a commission of 5% on sales made by Mackey. Pursuant to said agreement, between January 1, 1952 and October 27, 1952, Mackey received commissions of $5,159.19 on sales of Vascoloy's products to Rotex Company, a corporation, with its principal place of business in Dallas, Texas. The goods which were subject to these sales were transported in interstate commerce from the State of Illinois to the State of Texas. Rotex resold such products to Sears.

16. On or about October 27, 1952, Sears demanded that Vascoloy cease paying commissions to Mackey and advised Vascoloy that unless its commission arrangement with Mackey was terminated, Sears would refuse to make further purchases from Vascoloy or its customers. Pursuant to said demand by Sears, Vascoloy notified Mackey that it would no longer perform its obligations under the contract made between Mackey and Vascoloy on or about September 1, 1951. Sears' demand that Vascoloy terminate said agreement was the sole and proximate cause of its termination.

17. In April of 1951, Mackey invented a novel type of boring set for use with ¼" electric drills; application for a patent on said tool is pending. In the Spring of 1952, Mackey collaborated on the development of a new type of carbide-tipped lathe bit. Time Saver was formed to manufacture said boring set and to sell said boring set, lathe bit and other tools. As a result of Time Saver's national advertising and other promotional efforts, Time Saver has created a market for said tools and said tools have become identified with Time Saver.

[fol. 8] 18. In December of 1952, Sears arranged to purchase, and is now purchasing, carbide-tipped lathe bits which are copies of the carbide-tipped lathe bits developed by Mackey. Sears arranged to purchase and is now purchasing, plastic cases in which to package, display and resell said lathe bits, which are identical copies of the plastic cases used by Time Saver. The Sears' case contains the same legend on its display surface, the same type, size and colored lettering, and the same unique diagram as Time Saver's case. The words "Craftsman" and "Sears Roebuck & Co." are substituted for the words "Time Saver Tools, Mundelein, Ill." Sears has deliberately caused said case

and tool to be made to appear to be the same as the case and tool sold by Time Saver in order to appropriate the market for the Time Saver tool and to carry out Sears' plan to destroy each and every business engaged in by Mackey.

19. In or about June of 1952, Sears made arrangements to have Mackey's boring set copied. Sears has instructed its supplier to continue to manufacture copies of Mackey's boring set despite notice of Time Saver's patent application and prior rights in said set, and despite knowledge that said copies infriage on the invention embodied in Mackey's patent application.

20. Sears advertised the sale of said boring set at prices below the manufacturing cost thereof, induced its supplier of said boring set to sell the same to it below the manufacturing cost thereof with a promise of large future orders after Sears was successful in appropriating Time Saver's market therefor, and induced its supplier of said lathe bit to sell the same to it at prices lower than those charged Time Saver by the same supplier. Sears has advertised said tools for sale, and has sold them at unreasonably low prices with the specific purpose of appropriating the entire market therefor, of destroying Time Saver's sales thereof, and of injuring Time Saver's reputation by making it appear that Time Saver's prices for said tools are excessive.

21. Sears has sold such tools in some parts of the United States at prices lower than the prices exacted by Sears elsewhere in the United States for the purpose of destroying competition from Mackey or Time Saver.

22. All of the aforesaid acts and practices have been performed by Sears pursuant to its continuing plan to destroy [fol. 9] each and every business in which Mackey has engaged or may attempt to engage. The purpose and effect of this plan has been to discipline small suppliers and small competitors of Sears and cause them to accept terms dictated by Sears when entering into business dealings with Sears. Competition among persons who supply products of the kind which Sears purchases for resale in its stores has thereby been materially and unreasonably restrained. The aforesaid acts and practices constitute an attempt to monopolize each and every interstate business in which Mackey, or persons or corporations affiliated or controlled by Mackey, would otherwise engage. They also constitute

an attempt to exercise undue control over, and thereby to monopolize, all of the interstate commerce engaged in by small companies making sales to Sears, or who would be competitors in the market for products sold by Sears in its retail stores but for Sears' program of disciplining its suppliers.

23. If Sears had not engaged in the aforesaid continuing attempts to monopolize, Mackey, or corporations wholly controlled by Mackey, during the two years preceding filing of this complaint, would have had earnings and profits from the manufacture and sale of nursery lamps of approximately $150,000.00; commissions on the sale of products manufactured by Vascoloy in the amount of $15,000.00; earnings and profits on the sale of carbide-tipped lathe bits in the amount of $20,000.00; and earnings and profits in the manufacture and sale of boring sets in the amount of $5,000.00.

Wherefore, Plaintiff, Bruce A. Mackey, demands judgment against Sears in the amount of $570,000.00, plus his attorneys' fees and cost of suit, as authorized by Section 4 of the Clayton Act.

Plaintiff, Bruce A. Mackey, further prays that the court enter its injunctive decree perpetually restraining Sears from continuing the aforesaid attempt to monopolize and granting such further and additional relief as to the Court may seem meet.

Count II

For his second cause of action, Mackey says:

1. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1332. The amount herein in controversy exceeds $3,000.00, exclusive of interest and costs.

[fol. 10] 2. The allegations contained in Paragraphs 2, 3, 4, 7, 12, 13 and 14 are hereby incorporated herein by reference.

3. The reasonable value of Metalcraft as a going business in 1949 was $250,000.00. Mackey was required to pay out of his personal funds approximately $50,000.00 to discharge obligations of Metalcraft guaranteed by him.

Wherefore, Plaintiff Bruce A. Mackey demands judgment against Sears in the amount of $300,000.

Count III

For his third cause of action, Mackey says:

1. The allegations contained in Paragraph 1 of Count II, and Paragraphs 2, 7, 15 and 16 are hereby incorporated herein by reference.

2. The reasonable value of Mackey's contract with Vascoloy on October 27, 1952, was in excess of $75,000.00.

Wherefore, Plaintiff Bruce A. Mackey demands judgment against Sears in the amount of Seventy-Five Thousand Dollars ($75,000.00).

Count IV

Time Saver Tools, Inc., an Illinois corporation, Plaintiff, by its attorneys, complains of Sears Roebuck & Co., a New York corporation, Defendant, as follows:

1. The allegations contained in Paragraph 1 of Count II, and in Paragraphs, 5, 6, 7, 8, 17, 18, 19, 20, 21 and 22 of Count I, in which Counts Bruce A. Mackey is the plaintiff, are hereby realleged and incorporated herein by Time Saver Tools, Inc. by reference.

2. The reasonable value of the business appropriated by Sears from Time Saver by means of the aforesaid acts is Two Hundred Thousand Dollars ($200,000.00).

Wherefore, Plaintiff Time Saver Tools, Inc. demands judgment against Sears in the amount of Two Hundred Thousand Dollars ($200,000.00).

Count V

For its second cause of action against Sears, Time Saver says:

1. This action arises under Section 2(f) of the Robinson-Patman Act (38 Stat. 730, 49 Stat. 1526-28, 15 U. S. C. [fol. 11] Sec. 13(f) and Sections 4 and 16 of the Clayton Act (38 Stat. 731, 737, 15 U. S. C. Sections 15 and 26).

2. The allegations contained in Paragraphs 5, 6, 7, 8, 9, 10, 11, 17, 18, 19, 20, 21 and 22 of Count I, in which Counts Bruce A. Mackay is the plaintiff, are hereby realleged and incorporated herein by Time Saver Tools Inc. by reference.

3. Sears is engaged in the business of purchasing and reselling carbide-tipped lathe bit sets, plastic boxes, and boring sets, and each of said items, in interstate commerce.

4. In the course of such commerce Sears knowingly received from each of its suppliers of each of said items a price which was lower than the price charged by each of said suppliers to competitors of Sears, including Time Saver.

5. Knowing receipt of such price discriminations by Sears has substantially injured competition between Sears and Time Saver and tended to create a monopoly in Sears in the business of reselling such items in interstate commerce.

6. If the prices charged of Time Saver by suppliers who were simultaneously selling carbide-tipped lathe bit sets, plastic boxes and boring sets to Time Saver and to Sears had been no higher than the prices which were then being charged to Sears, Time Saver would have spent Fifteen Hundred Dollars ($1,500.00) less than it actually did spend for such supplies during the two years preceding the filing of this complaint.

Wherefore, Time Saver demands judgment against Sears in the amount of Forty-Five Hundred Dollars ($4,500.00) plus its attorneys' fees and cost of suit as authorized by Section 4 of the Clayton Act.

Count VI

For an additional cause of action Mackey says:

1. The allegations contained in Paragraph 1 of Count II and in Paragraphs 2, 3, 4, 5, 6, 7, 8, 11; 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 of Count I are hereby incorporated herein by reference.

2. All of the aforesaid acts and practices were performed by Sears in furtherance of its continuing plan to destroy each and every business in which Mackey has engaged or may attempt to engage. Said acts and practices have in [fol. 12] fact destroyed the business of Metalcraft, caused Vascoloy to breach its contract with Mackey, and appropriated the market created by Mackey through Time Saver for said boring set and said carbide-tipped lathe bits.

3. The value of Metalcraft as a going business in 1949 was $250,000.00. The loss to Mackey on said obligations of Metalcraft so guaranteed by him was approximately $50,000.00. The value of Mackey's contract with Vascoloy on October 27, 1952 was in excess of Seventy-Five Thousand Dollars ($75,000.00). The value of the market for said tools so appropriated was Two Hundred Thousand Dollars ($200,000.00).

4. The aforesaid acts and practices have caused Mackey damage, in addition to the specific amounts alleged in Paragraph 3 above, in the injury to Mackey's business reputation and ability to engage in any business.

Wherefore, Plaintiff Bruce A. Mackey demands judgment against Sears in the amount of Six Hundred Fifty Thousand Dollars, ($650,000.00).

Bruce A. Mackey and Time Saver Tools, Inc. Plaintiffs, By Edward I. Rothschild, John Paul Stevens, Norman J. Barry, Their Attorneys.

Rothschild, Stevens & Barry,
120 South La Salle Street
Chicago 3, Illinois
FRanklin 2-0653

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, plaintiffs demand a jury trial of the issues raised by the foregoing complaint.

Bruce A. Mackey and Time Saver Tools, Inc. Plaintiffs, By Edward I. Rothschild, John Paul Stevens, Norman J. Barry, Their Attorneys.

[fol. 13] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT TO DISMISS COMPLAINT—Filed July 14, 1953

Now comes defendant, Sears, Roebuck and Co., a corporation, by Leo H. Arnstein and Herbert E. Ruben, its attorneys, and moves the Court to dismiss the complaint

heretofore filed and each count thereof, or in the alternative to strike the complaint, or in the alternative to require the plaintiffs to make said complaint more definite and certain (all under Rule 12 of the Federal Rules of Civil Procedure), and for grounds of said motion shows to the Court the following:

1. There is a misjoinder of parties plaintiff in that the acts of which the plaintiff, Bruce A. Mackey, complains are in no wise related to the acts of which Time Saver Tools, Inc., an Illinois corporation, complains; the allegation in the complaint that Mackey is the sole stockholder of Time Saver does not transfer any cause of action from the corporation to the individual, or justify the joinder attempted here.

2. Count I of the complaint purporting to state a cause of action under the Sherman and Clayton Acts does not state a cause of action under these statutes. It consists almost entirely of unwarranted and prejudicial conclusions of the pleader and at best incompletely states facts which, if properly pleaded, might conceivably state a cause of action for isolated and disconnected acts of common law tort or breach of contract running variously to Metalcraft, Mackey, or Time Saver Tools, Inc. No facts are alleged tending to show a conspiracy to monopolize the existence or likelihood of abuse of monopoly power, acts done in furtherance of an attempt to monopolize, any undue restraint upon commerce, or any injury to the public. Neither specific damages to plaintiffs proximately resulting from the alleged violation of the anti-trust statutes nor a factual basis for the granting of the injunctive relief sought are pleaded.

3. Count II of the complaint apparently purports to state a common law cause of action for breach of contract and [fol. 14] and unfair competition arising out of Mackey's dealings with defendant in the manufacture and sale of lamps. Count II fails to state a cause of action under either theory of liability. There is no allegation as to whether the contract referred to was in writing or oral. The terms of the contract are not stated, the exact date of the contract is not set forth, there is no allegation that

Metalcraft was ready, willing and able to perform its alleged contract, there is no allegation as to whether Metalcraft acquiesced in Sears' alleged demands for extensions of delivery dates, the number of lamps allegedly refused by defendant in breach of the contract is not pleaded, nor are any facts alleged upon which the conclusion of palming off and misrepresentation could be based. The damages alleged are not the proper measure of damages resulting from defendant's alleged breach of contract and are speculative, remote and not causally related to the alleged wrongful acts.

4. Count III of the complaint purports to state a common law cause of action for inducing breach of an alleged contract between Mackey and Vascoloy-Ramet. Plaintiffs fail to allege facts showing the duration, territorial limits, and other terms of the alleged contract, whether said contract was oral or in writing, knowledge by the defendant of the existence of the contract, and malice on the part of the defendant. Count III fails to allege whether the "demand" by Sears set forth in Paragraph 16 of the complaint was oral or in writing, by whom said demand was made, whether the person making said demand had authority to speak for Sears and whether or not Mackey agreed to the termination of said contract with Vascoloy-Ramet or refused to agree thereto.

5. Count IV of the complaint apparently purports to state a common law cause of action for unfair competition with some implication of patent infringement. It consists almost entirely of conclusions of the pleader and fails to state a cause of action under either theory of recovery. No facts are stated to support the allegation that Time Saver Tools, Inc. had acquired common law rights in its packaging, trade name or trademark, if any, and that there was or is confusion with defendant's goods or the likelihood of confusion. Time Saver's claim in paragraph 17 of Count I, re-alleged in Count IV, that its products had be- [fol. 15] come identified with Time Saver is an attempt to have the court sanction monopoly control of non-patented devices. No facts are alleged showing the existence of a market for defendant to appropriate, of prior

rights in the tools referred to or in support of the allegations that defendant's prices were "unreasonably low".

6. Count V of the complaint purports to state a cause of action for violation of the Robinson-Patman Act. Plaintiffs fail to allege that each of the products in question, to-wit: carbide-tipped lathe bit sets, plastic boxes and boring sets are purchased by both plaintiffs and defendant from the same supplier, and plaintiffs further fail to allege facts showing a lessening in competition, a tendency towards the creation of a monopoly and specific allegations as to damages. Plaintiffs further fail to allege facts showing that the transactions in question occurred in interstate commerce.

7. Count VI of the complaint apparently purports to state a cause of action based upon some catch-all theory of tortious interference with plaintiff Mackey's business venture, and seeks remote and speculative damages. The allegations of this Count VI are merely repetitious of the allegations of Counts II, III and IV of the Complaint alleging respectively that defendant engaged in unfair competition with Metalcraft, induced a breach of Mackey's employment contract and engaged in unfair competition with Time Saver Tools, Inc.

8. Paragraph 9 of Count I of the complaint is entirely irrelevant and immaterial to the allegations of the complaint.

9. Paragraphs 10 and 11 of Count I of the complaint and as realleged in other counts consists entirely of unwarranted and prejudicial conclusions of the pleader, and should be stricken.

10. Paragraph 12 of the complaint shows upon its face that the corporation therein named, to-wit: Metalcraft, voluntarily accepted the requirements by the defendant that it, Metalcraft, sell its lamps only to Sears, and hence said allegation is immaterial and irrelevant and should be stricken.

11. Paragraph 13 of Count I of the complaint and as re-alleged in other counts is irrelevant and immaterial to the allegations of the complaint except insofar as it alleges a breach of contract and this latter allegation is a mere

[fol. 16] conclusion of the pleader. This paragraph should be stricken.

12. Paragraph 14 of the complaint fails to set forth the alleged date or dates when Sears sent quantities of lamps to Milwaukee and Detroit or listed same in its catalogs, does not set forth either within the paragraph itself or as an exhibit, the alleged misrepresentations by Sears in its advertising of lamps, does not show the relationship of the dates of said alleged activity to the dissolution of Metalcraft and the alleged effect of the defendant's alleged acts is a mere conclusion of the pleader.

13. Paragraph 15 fails to specify whether the alleged contract was oral or in writing, its duration, territorial limits, and other terms and further fails to allege knowledge and malice on the part of the defendant.

14. Paragraph 16 fails to allege whether the "demand" by Sears was oral or in writing, by whom it was made, and whether the person making said demand had authority to bind the defendant.

15. Paragraph 17 does not set forth with whom Mackey collaborated on the development of the carbide-tipped lathe bit, nor as to whether Mackey has any proprietary interest in said carbide-tipped lathe bit. Said paragraph is further deficient in that the allegations of the last sentence are mere conclusions of the pleader—no facts are set forth to establish what type of initial advertising and other promotional efforts Time Saver Tools, Inc. engaged in, in what area or what areas it has allegedly created a market for said tools, the number of tools sold by it and the manner in which said tools allegedly have become identified with Time Saver Tools, Inc.

16. The last sentence of paragraph 18 of the complaint is a mere conclusion of the pleader, unsupported by any allegations of fact.

17. Paragraph 19 refers to an alleged "invention" embodied in Mackey's patent application, without setting forth any definition or facts as to what the invention allegedly includes or the manner in which the boring set of Sears infringes upon the application for letters patent. Until letters patent are issued there is no prima facie cause of action for the alleged infringement thereof.

18. Paragraph 20 consists entirely of conclusions of the pleader; the name or names of the alleged supplier of Sears are not set forth, the manufacturing cost of the item to the [fol. 17] manufacturer is not set forth. There is no allegation in paragraph 20 that Time Saver Tools, Inc. purchases the boring set from the same manufacturer that Sears does. The allegations with reference to Sears' sale of the bits in said paragraph is a conclusion of the pleader and no facts are set forth to show the prices (either cost prices or sale prices) of either Sears or Time Saver Tools, Inc.

19. Paragraph 21 consists entirely of conclusions of the pleader and does not set forth the places where said alleged sales were made, the prices at which they were sold, nor does it allege that Time Saver Tools, Inc. was actively engaged in selling such tools in the same places where Sears sold them, or in what volume the same were sold either by Sears or by Time Saver Tools, Inc.

20. The allegations of paragraph 22 consist entirely of conclusions of the pleader. Its references to other suppliers and competitors are irrelevant and prejudicial. The allegations with reference to the alleged monopoly are entirely conclusions of the pleader and unsupported by any facts upon which such conclusions can be based. The allegations with reference to monopolizing interstate commerce engaged in by smaller companies are irrelevant conclusions of the pleader, and prejudicial.

21. The damages as claimed in paragraph 23 of the complaint do not flow from any causes of action properly pleaded or set forth in the complaint nor is any basis for injunctive relief shown.

22. Paragraph 3 of Count II of the complaint should be stricken as irrelevant and immaterial since the damages allaged are not properly referrable to the cause of action pleaded in this Count II.

23. Paragraph 2 of Count III should be stricken as no facts are alleged upon which to base the damages alleged therein.

24. Paragraph 2 of Count IV should be stricken as no facts are alleged upon which to base the damages alleged therein.

25. Paragraph 5 of Count V should be stricken as irrelevant and immaterial to any issue raised by the allegations of this Court V.

26. Paragraph 6 of Count V consists entirely of conclusions of the pleader.

27. Paragraph 2 of Count VI of the complaint consists [fol. 18] entirely of conclusions of the pleader and should be stricken.

28. Paragraph 3 of Count VI of the complaint consists of conclusions of the pleader and the allegations of damages contained therein bear no proper relation to the alleged wrongful conduct of defendant.

29. Paragraph 4 of Count VI of the complaint is a conclusion of the pleader and no facts are alleged to support this conclusion.

Leo H. Arnstein, Herbert E. Ruben, Attorneys for the Defendant.

Lederer, Livingston, Kahn & Adsit, Suite 1440—120 South LaSalle St., Chicago 3, Illinois. CEntral 6-3985.

(Original Not Signed)

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

ANSWER TO COUNT III OF THE COMPLAINT—Filed December 4, 1953

For answer to the allegations contained in Count III of the Complaint of the plaintiffs in the above entitled cause, Sears, Roebuck and Co., defendant, by its attorneys, says:

1. In answer to the allegations contained in paragraph 1 of said Count III, which allegations are incorporated by reference from other counts:

(a) Defendant denies the allegations contained in paragraph 1 of Count II;

(b) Defendant states that it has no knowledge or in-

formation sufficient to form a belief as to the truth of the averment contained in paragraph 2 of Count I;

(c) Defendant admits the allegations contained in paragraph 7 of Count I;

[fol. 19] (d) Defendant states that it has no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in paragraph 15 of Count I;

(e) Defendant denies each and every allegation contained in paragraph 16 of Count I.

2. Defendant denies the allegations contained in paragraph 2 of Count III.

Wherefore, the defendant prays judgment that Count III of the Complaint of the plaintiffs be dismissed with costs to the defendant.

Dated: Dec. 4, 1953.

(S.) Leo H. Arnstein, Herbert E. Ruben, Lederer, Livingston, Kahn & Adsit.

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

AMENDED MOTION OF DEFENDANT TO DISMISS THE COMPLAINT EXCEPT COUNT III THEREOF—Filed December 4, 1953

Now comes defendant, Sears, Roebuck and Co., by Leo H. Arnstein and Herbert E. Ruben, its attorneys, and moves the Court to dismiss the complaint heretofore filed, except Count III thereof, and for grounds of said motion shows to the Court the following:

1. Count I of the complaint fails to allege facts showing that any private harm plaintiffs may have suffered was incurred "by reason" of anything done by defendant in viola- [fol. 20] tion of the anti-trust laws, as required by Section 4 of the Clayton Act.

2. Count I of the complaint fails to state a cause of action under Section 1 of the Sherman Act in that no facts are alleged showing a contract or conspiracy in restraint of trade and no facts are alleged showing that defendant

has engaged in any conduct constituting an actionable restraint.

3. Count I of the complaint fails to state a cause of action under Section 2 of the Sherman Act in that no facts are alleged showing that defendant possesses the requisite market control, the requisite wrongful intent, or has engaged in the requisite wrongful acts required to show an attempt to monopolize or monopolization.

4. Count I of the complaint fails to state a cause of action under Section 3 of the Clayton Act in that said count only proscribes sellers or lessors and defendant was a purchaser under the arrangement in question. Further, no facts are alleged showing a substantial lessening of competition or a tendency toward monopoly as required by the Act.

5. Count I of the complaint fails to state a cause of action under Section 3 of the Robinson-Patman Act with respect to plaintiff's lamp business, since plaintiff was not a competitor of the defendant within the meaning of that statute.

6. Count I of the complaint fails to state a cause of action under Section 3 of the Robinson-Patman Act with respect to plaintiff's tool business in that the complaint has merely parroted the language of the statute without alleging any facts showing the time, place or circumstances constituting unlawful price cutting and without alleging facts showing that plaintiff was a direct competitor of defendant as required by the statute.

7. Count II of the complaint fails to state any common law cause of action with respect to plaintiff's lamp business in that no facts are alleged stating a cause of action for breach of contract. No common law cause of action is stated for unfair competition since no facts are alleged showing that plaintiff's lamp design had acquired a secondary meaning. The allegations as to defendant's alleged predatory price cutting do not state a cause of action since price cutting is not an actionable wrong at common law.

[fol. 21] 8. Count IV of the complaint fails to state any cause of action with respect to plaintiff's tool business. No cause of action is stated for patent infringement since from the face of the complaint it appears that plaintiff only has a patent application. No cause of action is stated for unfair competition since plaintiff fails to allege facts

necessary to establish secondary meaning in his tools nor are there any allegations that defendant has palmed off its tools as those of plaintiff's. Plaintiff only alleges conclusions of law with respect to alleged predatory price-cutting and in any event price cutting is not actionable at common law.

9. Count V of the complaint fails to state a cause of action under Section 2(f) of the Robinson-Patman Act in that plaintiff fails to allege that defendant received a discriminatory price with knowledge that such price was not justified by cost differentials and plaintiff further fails to allege that the tools sold to defendant were of like grade and quality as the tools sold to plaintiff.

10. County VI of the complaint is repetitious of Counts II, III and IV and should be stricken.

(S.) Leo H. Arnstein, Herbert E. Ruben, Attorneys for Defendant, Sears, Roebuck and Co.

Lederer, Livingston, Kahn & Adsit.

[fol. 22] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM—Filed May 12, 1954.

The issues in this case arise on the defendant's motion to dismiss the complaint, except Count III, to which an answer has been filed.

The complaint is brought by Bruce Mackey and Time Saver Tools, Inc., a corporation, against Sears, Roebuck & Co. and consists of six Counts.

Count V is brought under Section 2(f) of the Robinson-Patman Act (15 U. S. C. Sec. 13(f)) interdicting the receipt of a prohibited price discrimination. This Count is admittedly deficient under Automatic Canteen Co. v. Federal Trade Commission, 346 U. S. 61, decided since the complaint was filed.

Count I presents a claim for treble damages under the anti-trust laws and Counts II, IV and VI aver common law causes of action. The statutory and the common law claims will be considered separately.

The Claim for Treble Damages—Count I

This Count is brought on behalf of Mackey alone and purports to charge conduct offending Sections 1 and 2 of [fol. 23] the Sherman Act and Section 3 of the Robinson-Patman Act (U. S. C, Secs. 1, 2, 13(a)). The factual allegations are as follows:

(a) Mackey, as sole surviving stockholder, succeeded to the ownership of all of the rights of two "Metalcraft" corporations, since dissolved, which were engaged in the interstate business of making and selling nursery lamps. (Par. 3)

(b) The plaintiff Time Saver Tools, Inc., is engaged in the interstate business of manufacturing and selling tools. All of its stock is owned by Mackey. (Par. 5)

(c) Sears is engaged in general retail merchandising, selling nursery lamps and tools, among other items. It is the largest mail order company in the world and additionally operates over 700 retail stores in the United States and some foreign countries. The business of Sears is interstate. Its sales are presently at a rate of over $2,900,000,000 yearly. The "tremendous volume" of Sears gives it power to destroy the business and property of its small competitors and suppliers through refusals to deal with such suppliers or through the actual or threatened use of unreasonably low prices. Sears has used its power "to discipline and punish suppliers" with the specific intent to injure and destroy potential competitors who made purchases from such suppliers. The exercise of such power constitutes an intent to monopolize a part of interstate trade and has the effect of unreasonably restraining competition among suppliers and of coercing suppliers of Sears to deal with it on Sears' terms. (Par. 8-10)

(d) Beginning in 1949 Sears has engaged in a continuing attempt to destroy every business in which Mackey was engaged in order to punish him for his refusal to deal on

Sears' terms and to restrain others from similar refusals. (Par. 11)

(e) In 1946 Sears by threatening to discontinue its purchases caused Metalcraft to sell its nursery lamps exclusively to Sears. (Par. 12)

(f) In 1949 Sears notified Mackey that it would not accept 30,000 nursery lamps which Metalcraft was under contract to supply unless the price was reduced 20% declaring that if the reduction were refused Sears would ruin Mackey [fol. 24] and Metalcraft. (Par. 13)

(g) Mackey declined to accede to the price reduction and thereupon attempted to sell the nursery lamps through department stores in Milwaukee and Detroit. With the intent of despoiling Mackey's plans, Sears sent substantial quantities of the Metalcraft lamps, for which it had paid $2.20 apiece, for sale in Milwaukee and Detroit at 94¢, though not in other comparable cities. At the same time Sears listed the lamps in two of its catalogs at 84¢ apiece, supplying a cheap imitation of the Metalcraft lamps "to persons ordering from Sears' catalog representation of Metalcraft's lamp." As a direct result of such conduct, Metalcraft became insolvent and was dissolved. (Par. 14)

(h) In October, 1952, while Mackey was engaged in selling tools for Vascoloy, Sears caused Vascoloy to discharge Mackey under the threat of refusing to make further purchases from customers of Vascoloy. (Par. 15, 16)

(i) Time Saver was formed to manufacture and sell certain new type tools devised in part by Mackey. Through national advertising such tools became identified with Time Saver in the market. (Par. 17)

(j) Sears is presently purchasing and selling tools which are copies of the tools developed by Mackey in plastic cases which are copies of the cases used by Time Saver. The Sears case contains the same legend and design on its display surface but the words "Craftsman" and "Sears, Roebuck and Co." are substituted for the words "Time Saver Tools, Mundelein, Ill." Sears' purpose is to appropriate the market for the tools and at the same time to destroy Mackey. With respect to certain tools, Sears' conduct continued notwithstanding notice of Time Saver's patent application and despite knowledge that Sears' copies in-

fringe on the invention embodied in the patent application (Par. 18, 19)

(k) Through promises of future business Sears has been able to purchase tools from Time Saver's supplier at prices lower than the price charged Time Saver and has sold the tools below manufacturing cost for the purpose of appropriating the market and destroying Time Saver. (Par. 20)

[fol. 25] (l) Sears has sold tools in some parts of the United States at prices lower than others for the purpose of destroying competition from Mackey or Time Saver. (Par. 21)

(m) The described practices were undertaken by Sears in order to destroy Mackey and constitute an attempt to monopolize interstate commerce engaged in by Mackey and small companies making sales to Sears or which would be competitors of Sears in the retail market.

As a result of the alleged injustices, Mackey demands treble damages in the amonat of $570,000, together with incidental and injunctive relief. Time Saver does not join in the prayer for relief under this Count.

Discussion of the Sherman Act

So far as the Sherman Act is concerned, it is implicit in the plaintiff's brief that only a Section 2 violation is urged. No reliance is placed on Section 1. This is inevitable, since there is no charge of combination or conspiracy among distinct legal *entities* having separate economic motives, personal to themselves, which is an indispensable requisite for a Section 1 violation.

Times-Picayune *v.* United States, 345 U. S. 594, 626;
Timken Roller Bearing Co. *v.* United States, 341 U. S. 593, 598, 606;
Nelson Radio & Supply Co. *v.* Motorola, 200 F. 2d 911, 914 (C. C. A. 5th Circ. 1952);
United States *v.* Yellow Cab Co., 332 U. S. 218, 227.

To justify a suit for treble damages (15 U. S. C. Sec. 15), two conditions must concur. The plaintiff must establish (a) a violation of the anti-trust laws and (b) injury to the

plaintiff proximately resulting from the established violation.

Goodman & Son *v.* United Lacquer Mfg. Corp., 81 F. Supp. 890 (D. C. Mass. 1949);
Sunbeam Corporation *v.* Payless Drugstores, 113 F. Supp. 31 (D. C. Cal. 1953);
Nelson Radio & Supply Co. *v.* Motorola, supra.

[fol. 26] The Sherman Act decries conduct unreasonably restricting competition in the public market and a charge of transgressing the statute necessarily involves a public evil as distinguished from a purely private wrong.

Neumann *v.* Bastian-Blessing Co., 70 F. Sup. 447 (D. C. Ill. 1947; LaBuy, D. J.).

The factual requirements for a civil suit are no less severe than the requirements for a criminal indictment. Plaintiff argues that it is absurd to suggest that the public has no interest in an individual who is being deliberately destroyed. Assuredly the thought is valid but it serves no purpose in enlarging the scope of the statute.

Our initial task, therefore, is to determine whether Count I sufficiently describes an offense under Section 2 of the Sherman Act.

Rule 8(a) prescribes that a complaint shall include "a short and plain statement of the claim showing that the pleader is entitled to relief" to which is added the direction that each averment "shall be simple, concise and direct." While a cause of action need not be stated with the technical accuracy and completeness required at common law, the pleading must make it evident, at least in a practical way, that the pleader is entitled to relief.

Commercial Banking Corp. *v.* Indemnity Insurance Company of North America, 1 F. R. D. 380 (D. C. Pa. 1940)

The broad tolerance of the Rules does not extend to justify the allegation of a claim in the words of a statute and this is especially true in the case of a statute like the Sherman Act which defines a social and economic offense in terms of a

general principle without specific tests to aid in its application.

> Louisiana Farmers' Protective Union *v.* Great Atlantic and Pacific Tea Co., 131 F. 2d 419 (C. C. A. 8th 1942).

The degree of definition required in alleging ultimate facts varies from one type of case to another, but invariably enough of a factual nature related to the specific occurrences constituting the claim must be included to indicate that a cause of action is at least potentially present. Unless this test is met, the conduct of a trial would be a pointless waste of time.

[fol. 27] The problem, therefore, is whether Count I, viewed in this liberal aspect, states a case within Section 2 of the Sherman Act.

Section 2 has a dual aspect. It condemns both the act of monopolizing and an attempt to monopolize. As support for the monopoly charge, the complaint alleges that the defendant Sears is engaged in general retail merchandising, selling among other items nursery lamps and tools, and that its current annual business exceeds $2,900,000,000. These allegations are manifestly insufficient to establish monopoly or monopoly power.

In United States *v.* Columbia Steel Company, 34 U. S. 495, 527, the Court said:

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is of itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed.

> United States *v.* United Shoe Machinery Corp., 110 F. Supp. 295 (D. C. Mass. 1953).

In the instant case there is no statement as to Sears' volume in the nursery lamp and tool business, either nationally or locally, or any factors relating to the opportunities of the public to purchase in a free and unrestrained market. Sears' volume in other fields is clearly irrelevant. There is no factual statement showing that the predatory practices complained of have to the slightest extent lessened competition in the field of activity in which the plaintiff was engaged. The effectiveness of exclusionary practices employed against a single competitor cannot be held to be monopolization where others in the same field are numerous and active. The destruction of the plaintiff alone would in no sense deprive other com-[fol. 28] petitive entities of their market or affect the public to any measurable extent.

Neumann *v.* Bastian-Blessing Co., supra.

The other aspect of Section 2 which has pertinency is the interdiction of an "attempt to monopolize." The classical definition of Mr. Justice Holmes is immediately pertinent. In Swift & Co. *v.* United States, 196 U. S. 375, 396, he said:

> "The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happpen. Commonwealth *v.* Peaslee, 177 Massachusetts 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

This definition has received recent approval.

Lorain Journal *v.* United States, 342 U.S. 143, 153.

Since the complaint makes no showing that Sears had achieved an actual monopoly or had attained monopoly power in the field and in the area in which the plaintiff was engaged, it becomes pertinent to inquire whether the predatory practices described coupled with the economic strength possessed by Sears imply "an intent to monopolize a part of interstate trade" and afford evidence of a dangerous probability that a monopoly will ultimately be accomplished. The complaint can be searched in vain for any factual or near factual allegations that bring any such conviction to the mind.

Specifically the defect in the complaint is the absence of any causal connection between the destruction of the plaintiff and his corporations and the disciplining of Sears' sup-
[fol. 29] pliers on the one hand, and the elimination or degrading of general competition in the areas of business in which Sears and the plaintiff had a common interest on the other hand. The actions taken to ruin the plaintiff and discipline suppliers may be reprehensible but there is not the slightest showing of impending monopoly other than the bare assertion of the pleader.

It is true that an offensive monopoly need not be nation-wide. It may indeed embrace only a small locality. As stated by Mr. Justice Reed in United States *v.* Columbia Steel Co., 334 U. S. 495, 519:

> "The Sherman Act is not limited to eliminating restraints whose effects cover the entire United States. We have consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area."

United States *v.* Yellow Cab Co., 332 U. S. 218.

Gamco Inc. *v.* Providence Fruit & Produce Co., 194 F. 2d 484 (C. C. A. 1st 1952), where the monopoly operated within the confines of a single building.

However, the charge that Sears undersold the plaintiff in Milwaukee and Detroit is not sufficient to establish any destructive effect on the competition in those areas or any exclusionary practices.

Price cutting in itself is not inherently unlawful.
Schine Theatres v. United States, 334 U. S. 110, 120.

There is no charge that Sears and the plaintiff were the only vendors of nursery lamps in the two cities or any allusion to the financial strength or weakness of any other competitors who may have been engaged in those markets, or indeed any other allegations descriptive of a competitive situation in which the public interest was involved. All of the factual allegations emphasize the plaintiff as the primary object of Sears' destructive intent.

Both sides converge upon United States v. New York Great Atlantic and Pacific Tea Company, 67 F. Supp. 626 (D. C. Ill. 1946), affirmed 173 F. 2d 79, as being the most closely related decision. The defendant asserts that this case stands alone as sustaining a monopoly charge where [fol. 30] no dominating control of the market was proved, yet defendant offers no citations to authoritative cases where the decision has been criticized, limited or rejected. It is not necessary to justify this decision, although it is easily defensible and undoubtedly sound. So far as the case relates to Section 2 of the Sherman Act, it was presented to the court as an attempt to create a partial monopoly and a conspiracy between the principal defendant and its associated companies was charged. There was no contention that an actual monopoly had been accomplished and therefore the decision was based upon a different aspect of Section 2 from the group of cases, stressed by the defendant, in which the Supreme Court has measured the percentage of the business transacted by the offending corporation in the particular field of competition. The court found that where, in spite of a declaration of innocence of purpose the "conscious acts of a group are such as inevitably to work undue restraint of trade or a monopoly, in whole or in part, the actors thereby bring about transgression of the congressional rule of conduct." (p. 676 Emphasis supplied.) The court concluded that A. & P.'s plan of action consisting of numerous and divers restrictive practices inevitably and inherently tended to restrain trade and create a partial monopoly. Even though some one or all of the acts of A. & P. standing alone might not amount to a violation of law, "when coupled and inextricably interwoven with the activities of

Acco, (such actions) reflects inevitably the misuse of defendants' power in competition with others to such an extent as to create undue interference with commerce—undue restraint of trade—of such a character as to result in monopoly."

The separate and successive acts of the defendant factually recited in the first Count were invariably directed toward the elimination of the plaintiff alone, and therefore bear no real analogy to the impairment of the public interest proved in the A. & P. case.

The charge of the Sherman Act violation cannot be sustained.

The Claim Under Section 3 of the Robinson-Patman Act (15 U. S. C. 13-(a))

The second anti-trust violation seriously urged is an offense under Section 3 of the Robinson-Patman Act. So far as pertinent, this section provides:

> [fol. 31] "'It shall be unlawful for any person * * * to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lesson competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

The pertinent allegations of the complaint are:

> (a) Paragraph 14. Sears sent lamps which it had purchased from Metalcraft to Milwaukee and Detroit, though not to other comparable cities, for sale below cost.
>
> (b) Paragraph 20. Sears induced suppliers of lathe bits to sell the bits to Sears at prices lower than the prices charged Time Saver.
>
> (c) Paragraph 21. Sears sold tools in some parts of the United States at lower prices than elsewhere for the purpose of destroying competition from Mackey or Time Saver.

In the light of what has been said under the discussion of the Sherman Act, the only clause of Section 3 of the Robinson-Patman Act which is significant here is that which specifies that price discrimination is unlawful if it tends to injure, destroy or prevent competition with the person or grants or receives the benefit of the discrimination or with the customers of either. To succeed plaintiff must bring himself within the defined area of competition in order to show that he has been injured as a result of an infraction of the section.

Goodman & Son *v.* United Lacquer Mfg. Corp., supra.
Nelson Radio & Supply Co. *v.* Motorola, supra.
Sunbeam Corporation *v.* Payless Drug Stores, supra.

Manifestly Mackey was not a person who granted or received any price concession of a customer of Sears or its customers. This disposes of the allegations in Paragraphs 14 and 21 with finality.

The charge in Paragraph 20 that the common supplier of [fol. 32] lathe bit sets to Sears and Mackey sold to Sears at a lower price than Time Saver is irrelevant since Time Saver is not a party plaintiff to Count I. Further, the supplier of the bits—not Sears—is the offender described by the statute, and if any such cause of action is sustainable the supplier should necessarily be joined as a primary party defendant. Finally, the emasculated allegations of Section 20 hardly conform even to the simple requirements of Rule 8.

Count II—Common Law Cause of Action

Mackey is the sole party plaintiff in Count II. Plaintiff seeks to justify this Count as a common law action for the intentional and deliberate destruction of the plaintiff's businesses, accomplished through a planned program which, the plaintiff says, must be considered as a connected whole. The action, therefore, sounds in tort.

The substantial facts alleged are (1) Sears induced Metalcraft to sell its nursery lamps to Sears exclusively, (2) Sears refused to accept lamps which Metalcraft was under contract to supply Sears and demanded price reductions under threat that Sears would ruin Mackey and Metal-

craft if the reduction were refused, and (3) Sears sold Metalcraft the lamps below cost in Milwaukee and Detroit constituting markets which Metalcraft was attempting to develop.

A corporation has the right to select its customers and to refuse to sell its products for any reason whatsoever.

Times-Picayune *v.* United States, supra.
Nelson Radio & Supply Co. *v.* Motorola, supra.

The right arbitrarily to refuse to deal with or purchase from anyone should be equally immune from attack or criticism.

Price cutting is not inherently unlawful.

Schine Theatres *v.* United States, supra, at 120.
United States *v.* New York Great Atlantic & Pacific Tea Co., supra, at 642.

[fol. 33] No fraudulent practices are alleged. The sole impropriety charged is that Sears notified Mackey he would be ruined if he refused to accede to a price reduction. Such purpose not identifiable in some objective way with acts which are in and of themselves lawful does not render the conduct actionable.

Count IV—Common Law Action for Unfair Competition

This Count is brought by Time Saver as the sole plaintiff. The essence of the charge is that Sears was guilty of unfair competition in that it copied unpatented tools (applications for patents were pending) and the case in which the tools were presented to the public which were designed and offered for sale by Time Saver, the words "Craftsman" and "Sears, Roebuck & Co." were imprinted on the package offered to the public by Sears.

Suffice it to say that the complaint contains no allegations from which it could be concluded that any reasonably intelligent and alert member of the public was deceived into purchasing Sears' tools believing they were the products of Time Saver.

Plaintiff relies upon several cases of which Quaker Oats Co. *v.* General Mills, Inc., 134 F. 2d 429, decided in this Circuit is typical. Two excerpts from Judge Minton's opin-

ion make it unmistakably clear that the claimed cause of action cannot be sustained. At Page 431 the court said:

> "The plaintiff was bound to use reasonable care in the marketing of its product to see that the public was informed of the source thereof, and to so identify its product as to make it readily distinguishable from the defendant's product."

And again at Page 432

> "The plaintiff, in marketing its goods, is not bound to make them 'foolproof' so that no one can make a mistake in regard thereto.".

Unless it were shown that the plaintiff's product had acquired a secondary meaning identifying the product with the plaintiff, there would be no basis for asserting that the public was misled even though the package and its contents offered by Sears were identical with that of Time Saver. Count IV is also deficient in this respect.

[fol. 34] Count VI—Omnibus Count at Common Law

This Count is brought by Mackey alone. In effect it duplicates all of the preceding Counts except Count I and charges the practices of Sears were performed in furtherance of its plan to destroy Mackey and his businesses. In view of the position herein expressed on Counts II, IV and V, obviously most of the allegations are superfluous and at best background or evidentiary material. The defendant concedes that that portion of Count VI which duplicates Count III is sustainable. The defendant has sought the elimination of neither Count III or Count VI on the basis of duplication. No charge or prejudice to the defendant, if both Counts are permitted to stand, has been urged and none is perceivable. Under these circumstances and in view of this court's liberal attitude on questions of pleadings, the motion to strike Count VI is denied.

The Problem as to Whether an Amendment Should Be Allowed

This case has been argued extensively and with great skill. There is nothing in the pleading to indicate that

any supplemental allegations would establish a monopoly or monopoly power by Sears in the field and localities in which the plaintiff conducted his several businesses, or that the alleged wrongful practices of Sears affected the open and public market in such a way as to lay a foundation for a supportable charge of an attempt to monopolize. In respect to Section 3 of the Clayton Act the circumstances recited do not coincide with the requirements of the law. Therefore, leave to amend the complaint under the anti-trust laws will be denied.

The allegations of Count II are not suggestive of practices a fuller or correct statement of which would constitute a cause of action, and therefore leave to amend in respect to this claim will be denied.

As to Count IV, the situation is somewhat different. Supplementing the Count with allegations showing that the lathe bit package had become identified with Metalcraft in the public mind and that the Sears package deceptively [fol. 35] the same, notwithstanding the imprint of Sears' own trade name, would supply the existing deficiencies, and therefore leave to amend the claim for unfair competition would be in order.

In net, Counts I, II, IV, and V will be striken with leave to amend Count IV and without leave to amend Counts I, II and V.

Counsel will confer and present a draft order not inconsistent with the views herein expressed within five days from the date hereof.

Julius J. Hoffman, Judge

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

May 13, 1954

Chambers of Judge Julius J. Hoffman

MEMORANDUM—Filed May 13, 1954

Counsel for the defendant have called the Court's attention to the inadvertent quotation of Section 13 instead of [fol. 36] Section 13a, Title 15, U.S.C., appearing on page 9 of the memorandum filed by the Court on May 12, 1954. The memorandum is therefore amended to provide for the substitution of Section 13a for Section 13, as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

Julius J. Hoffman, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ORDER AND JUDGMENT—May 19, 1954

This cause coming on to be heard upon defendant's amended motion to dismiss the complaint, except Count

III thereof, to which an answer has been filed, the mat-
[fol. 37] ter having been argued extensively in written briefs, the Court having filed its Memorandum on May 12, 1954, as amended by Memorandum of May 13, 1954, and being fully advised in the premises, hereby finds and concludes:

1. Count I of the Complaint fails to state a claim upon which relief can be granted, and fails to conform to the requirements of Rule 8 of the Rules of Civil Procedure for the United States District Courts; an amendment to Count I would not enable the plaintiff to lay a foundation for a supportable claim for relief under the statutes on which plaintiff relies, and accordingly there is no just reason for delaying the final determination of the legal issues raised by defendant's amended motion to dismiss insofar as it is directed at Count I;

2. Count II fails to state a claim upon which relief can be granted; the allegations of Count II are not suggestive of practices a fuller or correct statement of which would constitute a cause of action, and accordingly there is no just reason for delaying the final determination of the legal issues raised by defendant's amended motion to dismiss insofar as it is directed at Count II of the complaint;

3. Count IV of the complaint fails to state a claim upon which relief can be granted; the existing deficiencies in Count IV could be eliminated by amendment;

4. Count V of the complaint fails to state a claim upon which relief can be granted;

5. Count VI of the complaint states a claim upon which relief can be granted insofar as it duplicates Count III;

Wherefore, It Is Hereby Ordered:

1) The amended motion of the defendant to strike Counts I, II, IV and V of the Complaint, is hereby sustained and said Counts are hereby stricken;

2) Plaintiff is hereby granted leave to file an amended Count IV of the Complaint within 20 days from this date.

3) The amended motion of the defendant to strike Count VI of the Complaint is hereby denied insofar as said Count VI realleges the allegations contained in Count III of the plaintiffs' Complaint; the remaining allegations of Count VI are hereby stricken and the defendant is

ordered to answer that portion of Count VI not stricken by this order within 20 days from this date.

4) Leave to amend Counts I, II and V of the Complaint [fol. 38] is hereby denied; as to said Counts, the suit be and the same is hereby dismissed on the merits, judgment be and the same is hereby entered against the plaintiffs and the defendant may go hence without day.

Dated: May 19, 1954.

Enter: Julius J. Hoffman, Judge.

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed June 8, 1954

Notice Is Hereby given that Bruce A. Mackey and Time Saver Tools, Inc., a corporation, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the Order and Judgment entered in this action on May 19, 1954.

(S) Edward I. Rothschild, John Paul Stevens, Norman J. Barry, Attorneys for Appellants, Bruce A. Mackey, and Time Saver Tools, Inc.

[fol. 39] Rothschild, Stevens & Barry, 120 South La Salle Street, Chicago 3, Illinois

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Certificate of mailing (omitted in printing)

Cost Bond on Appeal for $250.00 filed June 7, 1954, omitted in printing.

[fol. 40] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

APPELLANT'S STATEMENT OF POINTS—Filed June 8, 1954

Appellants, Bruce A. Mackey and Time Saver Tools, Inc., plaintiffs, upon their appeal to the United States Court of Appeals for the Seventh Circuit from the order entered in this cause on May 19, 1954, intend to rely upon the following points:

1. The District Court erred in making and entering the order appealed from dated May 19, 1954.

2. The order appealed from was not authorized, justified, or warranted by law or by the record before the Court.

3. The District Court erred in finding that Count I of the complaint fails to state a claim upon which relief can be granted.

[fol. 41] 4. The District Court erred in finding that Count I of the complaint fails to conform with the requirements of Rule 8 of the Rules of Civil Procedure for the United States District Courts.

5. The District Court erred in finding that an amendment to Count I would not enable the plaintiff to state a supportable claim for relief under the antitrust laws.

6. The District Court erred in finding that Count II fails to state a claim upon which relief can be granted.

7. The District Court erred in finding that Count IV of the complaint fails to state a claim upon which relief can be granted.

8. The District Court erred in finding that Count V of the complaint fails to state a claim upon which relief can be granted.

9. The District Court erred in sustaining the amended motion of the defendant to strike Counts I, II, IV, and V of the complaint and in ordering said counts to be stricken.

10. The District Court erred in ordering that the allegations in Count VI, except insofar as they reallege the allegations contained in Count III of the complaint, be stricken.

11. The Court erred in denying leave to amend Counts I, II and V of the complaint.

12. The Court erred in entering judgment against two plaintiffs on Counts I, II and V of the complaint.

(S) Edward I. Rothschild, John Paul Stevens, Norman J. Barry, Attorneys for Appellants.

Certificate of service (omitted in printing)

[fol. 42] Appellants' designation of contents of record on appeal (omitted in printing).

[fol. 43] Proof of service (omitted in printing).

[fol. 44] And afterwards on, to wit, the 17th day of July 1954 came the Defendant, Appellee by it attorneys and filed in the Clerk's office of said Court its certain Appearance in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT

APPEARANCE—Filed July 17, 1954

Now comes Sears, Roebuck and Co., a corporation organized under the laws of the State of New York, and in compliance with paragraph 3 of rule 10 of the United States Court of Appeals for the 7th Circuit, states that it is the appellee in the above captioned cause and that its attorneys are Leo H. Arnstein, Herbert E. Ruben, and Lederer, Livingston, Kahn & Adsit, whose addresses are Suite 1440, 120 South LaSalle Street, Chicago 3, Illinois.

Sears, Roebuck and Co., By L. H. Arnstein, Herbert E. Ruben, Lederer, Livingston, Kahn & Adsit.

[fol. 45-46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47-48] IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11225

BRUCE A. MACKEY, Plaintiff-Appellant

vs.

SEARS, ROEBUCK & Co., a New York Corporation, Defendant-Appellee

MOTION TO DISMISS—Filed November 15, 1954

Now Comes Defendant-Appellee, Sears, Roebuck & Co., a corporation, by Leo H. Arnstein and Herbert E. Ruben, its attorneys, and moves the Court as follows:

(1) To dismiss the appeal taken herein for lack of a final and appealable order meeting the requirements of Title 28 U.S.C.A. Sec. 1291.

(2) In the event that this Court should not grant Paragraph (1) of this Motion, to extend the time for Appellee to file its Brief on this appeal to thirty (30) days after the Order of Court is entered denying Paragraph (1) of this Motion.

(4) In any event, to postpone oral argument on the within appeal until the January, 1955, Session of this Court.

In support of this Motion, the attached Memorandum of Law and Affidavit are made a part hereof.

Leo H. Arnstein, Herbert E. Ruben, Attorneys for Sears, Roebuck & Co., Defendant-Appellee.

[File endorsement omitted.]

[fol. 49] IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11225

BRUCE A. MACKEY, Individually and TIME SAVER TOOLS, INC., an Illinois Corporation, Plaintiffs-Appellants,

vs.

SEARS, ROEBUCK & Co., a New York Corporation, Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

OPINION—January 18, 1955

Before DUFFY, Chief Judge, MAJOR and SWAIM, Circuit Judges.

DUFFY, Chief Judge. The complaint herein containing six counts was filed by two plaintiffs, Bruce A. Mackey, an individual, and Time Saver Tools, Inc., a corporation, which was wholly owned by Mackey. They will hereinafter be referred to as plaintiff. The complaint alleged that since 1949 Sears had directed a course of predatory conduct successively at three business ventures carried on by plaintiff: (1) by localized price-cutting, it destroyed his lamp business; (2) by use of threatened boycott, induced a breach of plaintiff's contract for commissions with "Vascoloy", and (3) is attempting to destroy his tool business by means of unfair competition.

Count 1 alleges a deliberate and announced plan by Sears to destroy plaintiff's business activities, and that such a plan is violative of the Sherman Act and § 3 of the Robinson-Patman Act. In this count, plaintiff seeks treble damages and equitable relief under the Clayton Act. Counts 2, 3 and 4 are common law counts. In count 2 plaintiff seeks damages for the intentional destruction of [fol 50] his lamp business. In count 3 plaintiff seeks damages for defendant's inducement of the breach of his commission contract with "Vascoloy". In count 4 plaintiff seeks damages for unfair competition. Count 5 was a claim

by Time Saver under § 2(f) of the Robinson-Patman Act. However, this count was abandoned by plaintiff after the decision by the Supreme Court in *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61. Count 6 alleges defendant's entire predatory program was actionable under common law.

Defendant moved to dismiss the entire complaint. Later, defendant filed an answer to count 3 together with an amended motion to dismiss the balance of the complaint. The District Court ordered counts 1 and 2 to be stricken without leave to amend, and found that there was no just reason for delaying the final determination of the issues raised by these counts, and directed that judgment be entered thereon against plaintiff. The Court also struck count 4 but granted plaintiff leave to amend, which was done, and this count is now at issue. The Court struck all of the allegations of count 6 except the portion which realleged the facts covered by Count 3.

Plaintiff appeals from the order and judgment dismissing portions of the complaint without leave to amend. The appeal, in effect, challenges the holding of the District Court that the facts alleged in Counts 1 and 2 do not state, and could not be amended to state, a claim upon which relief can be granted.

Defendant moved to dismiss the appeal on the ground that the order and judgment appealed from is not a final or appealable order under the requirements of § 1291, Title 28, U.S. Code. This section provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *." Certain exceptions to this rule provided in § 1292 are not here applicable.

Because of the importance of the questions raised by the motion to dismiss the appeal, we set the motion down for oral argument after briefs had been submitted. In deciding whether the District Court entered a final decision, we must interpret Rule 54(b), Federal Rules of Civil Procedure.

[fol. 51] Prior to September 1, 1938, the effective date of the Federal Rules of Civil Procedure, the order in this case would not have been appealable, because it did not dis-

pose of all of Mackey's claims against Sears. *Collins* v. *Miller*, 252 U.S. 364. As originally adopted, Rule 54(b) authorized the entry on one claim in a multiple claim suit, when the issues material to that claim and all counterclaims arising out of the same transaction or occurrence had been determined. The validity of the rule in its original form was upheld in *Reeves* v. *Beardall*, 316 U.S. 283.

Amended Rule 54(b) provides: "*Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims, shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

A conflict has arisen among the various courts of appeals as to the effect to be given to this rule. We find the First and Third Circuits lined up on one side holding generally that where an order has been entered by a district court judge, where, as was done in the case at bar, he makes a "determination",[1] jurisdiction is automatically and conclusively conferred upon the courts of appeals to hear the appeal. However, the Second Circuit and the Court of Appeals of the District of Columbia have reached a contrary conclusion, holding, in effect, that the courts of appeals are required to make an independent determination as to whether the order in question was, in fact, a final order. This Circuit has not previously passed directly on the question, although there was discussion of the effect of the amended rule in *Winsor* v. *Daumit*, 179 F. 2d 475.

[1] The term "determination" includes "the express determination that there is no just reason for delay" and also the "express direction for the entry of judgment."

The first case to discuss the proper interpretation to be given to Rule 54(b) as amended was *Pabellon v. Grace Line, Inc.*, 2 Cir., 191 F. 2d 169. The panel considering [fol. 52] this case was Judges Chase, Clark and Frank, Judge Clark writing the opinion for the Court. It was held that an order dismissing a third party complaint was an appealable order where the district court had complied with the requirements of Rule 54(b). The Court agreed that the appeal taken in that case would have been proper even prior to the amendment of Rule 54(b), but Judge Clark stated that the district court, by making a determination that there was no just cause for delay and that he was entering a final order under Rule 54(b) relieved the Court of Appeals from the task of making an independent analysis to determine whether or not the order was, in fact, final and appealable. Judge Frank, in a concurring opinion, took issue with Judge Clark's interpretation of Rule 54(b) stating that such an interpretation would render the rule invalid as beyond the statutory power of the Supreme Court.

Eight days after the decision of the Second Circuit in the *Pabellon* case, another panel of that court consisting of Judges Swan, Augustus Hand and Learned Hand, in *Ehrgenheimer v. General Mills*, 191 F. 2d 237, held in accordance with the view previously expressed by Judge Frank in the *Pabellon* case. The Court held that no appealable order had been entered, and decided that it was the duty of the appellate court to determine its own jurisdiction and that such jurisdiction could not be controlled by the finding of a district court judge. Thereafter, in *Sopinsky v. Hertz Drive-UR-Self Systems, Inc.*, 194 F. 2d 424, Judge Clark vigorously defended the view that he had previously expressed in the *Pabellon* case.

The same question came before the Court of Appeals of the Third Circuit in *Bendix Aviation Corp. v. Glass*, 195 F. 2d 267. In that case a counterclaim was dismissed and the District Court made the requisite "determination" under Rule 54(b) that there was no just reason for delay and that final judgment be entered. The case was finally heard before the entire court sitting *en banc*, and it was held, with two judges dissenting, that the effect of Rule

54(b) was to render conclusive insofar as the jurisdiction of the court of appeals was concerned, the finding of the district judge that a final appealable order was being entered. Shortly thereafter the Court of Appeals for the First Circuit, in *Haston Medical Supply Co. v. Lea & Febiger*, 195 F. 2d 853, in an opinion by Chief Judge Magruder, stated that the First Circuit was in full agree- [fol. 53] ment with the opinion of the Third Circuit in *Bendix Aviation Corp. v. Glass, supra*. More recently the Court of Appeals for the District of Columbia in *Gold Seal Co. v. Weeks*, 209 F. 2d 802, in an opinion by Chief Judge Stephens, followed the rule laid down by the Second Circuit in the *Flegenheimer* case.

Thus we find not only courts of appeals of two circuits opposing the view adopted by the courts of appeals of two other circuits, but we find panel opposed to panel in the Second Circuit and a vigorous dissent by two judges in the Third Circuit. Also, Professor Moore strongly espouses the views of Judge Clark insisting that such views properly reflect the intent of the draftsmen of the 1948 amendment to Rule 54(b). *Moore's Federal Practice*, (Second Edition, 1953), Vol. 6, pp. 228-230. It is of interest to note that Professor Moore was active in formulating and drafting the amended rule (*Pabellon v. Grace Line, Inc.*, 191 F. 2d 169, 173) and, of course, Judge Clark was the reporter of the Advisory Committee which recommended the amended rule to the Supreme Court.

It would seem that the Supreme Court should promptly decide the important question here at issue in order to reconcile the divergent and conflicting views which have developed among and within the circuits. The question is constantly recurring. An early decision by the Supreme Court would be most helpful.

The Second and District of Columbia Circuits have adopted a negative approach in interpreting the rule. They say that if, in a multiple claim suit, a trial judge fails to enter a "determination", then, although otherwise the order would have been appealable under § 1291 it remains interlocutory and non-appealable; that thus interpreted the rule does not alter the jurisdiction of the appellate courts as fixed in §§ 1291 and 1292. They argue further

that the jurisdiction of a court of appeals cannot rest on a district court's decision as to whether or not he will enter a "determination" described in Rule 54(b).

We think the interpretation announced by the First and Third Circuits is correct. We feel certain that such was the understanding of the Advisory Committee as so well stated by Judge Clark and Professor Moore. We find ourselves in agreement with the following statement in the opinion of the *Bendix Aviation Corp.* case, 195 F. 2d 267, 269, 270: "* * * We read that rule, as embodied in [fol. 54] amended Rule 54(b), to be that in a multiple claims case the judgment which finally adjudicates all the claims is the only judgment having finality unless the district court in the exercise of its discretion expressly determines that there is no just reason for delay with respect to the entry of a final judgment upon a particular claim in the action and accordingly expressly directs the entry of a final judgment adjudicating that claim. In such case the rule says that 'the court may direct the entry of a final judgment.' This is language of grant not of restriction and it requires that the judgment thus entered on a single claim is to be regarded as just as final, so far as further revision by the district court is concerned, as though the claim thus adjudicated were the sole claim for relief embodied in a wholly independent action. For when such a judgment has been entered it may at once be enforced and executed, unless enforcement is stayed by the court under Rule 62(h)."

Section 1291 makes all final decisions appealable. The statute does not define the phrase "final decision". We have held that the new rules have the effect of statutes. *Wilson* v. *Daumit*, *supra*, p. 477. In that opinion we pointed out "* * * and if there is a conflict between a procedure provided in an earlier Act of Congress and that provided by the rules, the former must yield to the latter, * * * for the Act of Congress under which the rules were authorized expressly provided that, after they became effective, any laws in conflict therewith would no longer be of any force or effect."

We agree that in one sense the jurisdiction of a court of appeals is at least indirectly affected by an order or

judgment with a "determination" under Rule 54(b). But, in a somewhat similar manner, our jurisdiction was often affected by Rule 73(a) whereby the time was shortened for taking an appeal, yet we had no difficulty in upholding and enforcing that rule. *Ray, et al.* v. *Morris, et al.*, 170 F. 2d 498.

In his concurring opinion in *Lopinsky*, 194 F. 2d at 428 Judge Clark refers to a number of the rules in the Federal Rules of Civil Procedure, while referring directly to district court practice, do have some consequential effect on when courts of appeal might consider the issues. As far as we are advised, the validity of these rules has not been questioned because of the effect on when a court of appeals [fol. 55] may pass upon the issues. We have no difficulty in applying the positive approach in interpreting Rule 54(b).

In our judgment the negative operation of Rule 54(b) affects appellate jurisdiction just as much as the positive approach. In either case the district judge is timing his final decision on less that all of the claims in a multiple claim suit. Under either approach, the jurisdiction of the court of appeals is indirectly affected. We think that the rule-making authority of the Supreme Court existed as to all procedural matters and activities in the district court even though they might consequentially affect appellate jurisdiction.

Our decision herein, is in accord with our statement in *Winsor* v. *Daumit*, *supra* p. 478: "We think, also, that the rule should not be considered as curtailing appellate jurisdiction but rather as one fixing the procedure of the district court as to conditions affecting terms upon which an appeal may be taken in advance of a determination of the entire case."

In view of our decision it is not necessary to decide the point much discussed in the briefs as to whether the order and judgment entered herein would have been final and appealable prior to the 1948 Amendment of Rule 54(b).

The motion to dismiss the appeal is Denied.

[fol. 56] In United States Court of Appeals
for the Seventh Circuit

No. 11225

Bruce A. Mackey, individually and Time Saver Tools, Inc., An Illinois Corporation, Plaintiffs-Appellants,

vs.

Sears, Roebuck and Co., a New York Corporation, Defendant-Appellee

Order Denying Motion to Dismiss the Appeal.—January 18, 1955

This matter comes before the Court on a Motion to Dismiss Appeal, answer thereto, and memorandum briefs, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by the Court that the Motion to Dismiss this appeal be, and the same is hereby, denied.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] Supreme Court of the United States
October Term, 1954

No. 617

[Title Omitted]

Order Allowing Certiorari.—Filed March 28, 1955.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Harlan took no part in the consideration or decision of this application.

(2659-1)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 34

SEARS, ROEBUCK AND CO., a New York corporation,
Petitioner,

vs.

BRUCE A. MACKEY, Individually, and
TIME SAVER TOOLS, INC., an Illinois corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

LEO H. ARNSTEIN
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Chicago 3, Illinois
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The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No.

SEARS, ROEBUCK AND CO., a New York corporation,
Petitioner,

vs.

BRUCE A. MACKEY, Individually, and
TIME SAVER TOOLS, INC., an Illinois corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case denying Petitioner's motion to dismiss Respondents' appeal.

OPINIONS BELOW.

The memorandum opinion of the District Court is unreported and appears at page 22 of the printed Record filed contemporaneously herewith. The opinion of the United States Court of Appeals is not yet reported and is printed in Appendix A hereto, *infra*, page 2a.

JURISDICTION.

The order of the Court of Appeals was entered on January 18, 1955, Appendix A, page 10a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

The following questions are presented:

(1) When more than one claim for relief is presented in an action, does the dismissal of some but not all of the claims by a district court judge with an express determination that a final order is being entered and that there is no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, automatically and conclusively create a final appealable order conferring immediate jurisdiction in the court of appeals?

(2) If Rule 54(b) is thus automatically construed so as to confer appellate jurisdiction whenever a district court judge so decides irrespective of whether under prior law such jurisdiction existed, does the Rule go beyond the rule-making powers of the United States Supreme Court in that it expands the jurisdiction of appellate courts fixed by Section 1291 of Title 28 of the United States Code?

RULE AND STATUTES INVOLVED.

The rule and statutory provisions involved are Rule 54(b) of the Federal Rules of Civil Procedure, as amended, 28 U.S.C.A. Rule 54(b); Section 1291 of "Judiciary and Judicial Procedure", 28 U.S.C.A. Sec. 1291; and Section 2071 of "Judiciary and Judicial Procedure", 28 U.S.C.A. Sec. 2071. The statutes are printed in Appendix B, *infra*, page 11a. Rule 54(b) reads as follows:

"**Judgment Upon Multiple Claims.** When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

STATEMENT.

A six-count complaint was filed against Sears, Roebuck and Co., a New York corporation, on May 21, 1953, by Bruce A. Mackey, a resident of Illinois, and Time Saver Tools, Inc., an Illinois corporation. Bruce A. Mackey is the sole stockholder of Time Saver Tools, Inc. The jurisdiction of the District Court was invoked as to certain counts because of alleged violations of certain of the federal anti-trust laws and the patent laws. As to the common law counts, jurisdiction was invoked under 28 U.S.C. Sec. 1332, the amount in controversy being in excess of $3,000 and plaintiffs and defendant being of diverse citizenship. (R. 3, 9). In essence, the complaint alleged that defendant had over a period of years engaged in a planned course of conduct designed to drive Mackey out of any and all business ventures he engaged in, evidenced by some half-dozen allegations of overt conduct. By realleging these allegations singly and in combination, plaintiffs purported to state a variety of causes of action including violations of the Sherman

Act, the Clayton Act, the Robinson-Patman Act, common law unfair competition and patent infringement. On defendant's amended motion to dismiss all of the complaint except Count III thereof, the District Court dismissed Counts I, II and parts of Count VI without leave to amend and struck Count IV with leave to amend. Plaintiffs abandoned Count V. Count I embraced the anti-trust law theories of liability and Count II covered a claim of unfair competition based upon one phase of alleged overt conduct. As to those portions of the complaint struck without leave to amend, the District Court found, in accordance with Rule 54(b) of the Federal Rules of Civil Procedure, that there was no just reason for delay and expressly directed the entry of final judgment as to the dismissal of Counts I and II and parts of Count VI. (R. 36). Plaintiffs have filed an amended Count IV to which defendant has answered and the parties hereto are now at issue in the District Court on Count III, amended Count IV and that part of Count VI not struck.

Thereafter, on June 8, 1954, plaintiffs appealed to the United States Court of Appeals for the Seventh Circuit from that part of the order of the District Court dismissing portions of their complaint without leave to amend. (R. 38). On November 15, 1954, defendant filed a motion to dismiss the appeal upon the ground that no final appealable order had been entered meeting the requirements of 28 U.S.C. Sec. 1291. (Appendix A, *infra*, page 1a). On January 18, 1955, the Court of Appeals denied defendant's motion to dismiss the appeal for lack of appellate jurisdiction upon the sole ground that the finding of the District Court as to finality under Rule 54(b) conclusively and automatically conferred jurisdiction upon the Court of Appeals, the Court concluding,

> "In view of our decision it is not necessary to decide the point much discussed in the briefs as to

whether the order and judgment entered herein would have been final and appealable prior to the 1948 amendment of Rule 54(b)." (Appendix A, *infra*, page 9a).

REASONS FOR GRANTING THE WRIT.

1. The Conflict Among and Within the Circuits.

The decision of the court below in this case is in direct conflict with decisions of the Second[1] and District of Columbia[2] Circuit Courts of Appeals; it agrees with decisions of the Third[3] and First[4] Circuit Courts of Appeals. In the Second Circuit, a conflict which has been given full expression by Judges Learned Hand, Clark and Frank in three different cases,[5] has raged[6] between two

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[1] **Flegenheimer v. General Mills, 191 F. 2d 237 (C.A. 2).**

[2] **Gold Seal Co. v. Weeks, 209 F. 2d 802, 810 (D. of C., C.A.).**

[3] **Bendix Aviation Corp. v. Glass, 195 F. 2d 267 (C.A. 3);** this case has recently been annotated in 38 ALR 2d 356 under the heading, "Operation and effect of Federal Civil Procedure Rule 54(b) and similar state rules governing entry of judgment on multiple claims."

[4] **Boston Medical Supply Co. v. Lea & Febiger, 195 F. 2d 853 (C.A. 1); Francis v. Crafts, 203 F. 2d 809 (C.A. 1).**

[5] **Pabellon v. Grace Line, 191 F. 2d 169 (C.A. 2); Flegenheimer v. General Mills, 191 F. 2d 237 (C.A. 2); Lopinsky v. Hertz Drive-UR-Self Systems, Inc., 194 F. 2d 422 (C.A. 2).**

[6] The word "raged" is used advisedly as indicated by the following statement from the concurring opinion in the Third Circuit with respect to the conflict which this issue has engendered:

> "* * * The view to which we are persuaded has recently been elaborated in opinions expressing the thinking of a majority of the judges of the Court of Appeals for the Second Circuit. Their reasoning considered, we are not sure that we can shed additional light upon the problem; but we are sure that in the effort and in the exposition of our minority views here, we can and shall avoid the heat generated elsewhere in connection with minority views on the other side of this question." **Bendix Aviation Corp. v. Glass, 195 F. 2d 267, 277.**

panels of the Court. In the Third Circuit, a panel of that Court first decided the question in accordance with the views of the majority in the Second Circuit but that opinion was withdrawn and the Court, sitting *en banc*, reversed itself with two judges disagreeing on the point involved in a special concurring opinion.[7] The court below has detailed the conflict in its opinion (Appendix A, *infra*, page 4a) and concluded:

> "It would seem that the Supreme Court should promptly decide the important question here at issue in order to reconcile the divergent and conflicting views which have developed among and within the circuits. The question is constantly recurring. An early decision by the Supreme Court would be most helpful."[8]

Judge Learned Hand in his opinion dealing with the same problem but reaching the opposite result also concluded:

> "No doubt the answer is not as clear as one might wish; else the courts would not be so at odds as they are. In the end, the Supreme Court will no doubt have to pass upon it; meanwhile, we can only follow what light we have."[9]

The position taken by the court below in this case is that in a multi-cause action when the district court judge

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[7] **Bendix Aviation Corp. v. Glass, 195 F. 2d 267 (C.A. 3).**

"On the first hearing, the Third Circuit held that the order in question lacked finality for purpose of appeal: it was not final under prior law; and amended 54(b) should not be construed as authorizing a district court by certificate to make an order final that would not have been under prior law. * * * This opinion was withdrawn and a rehearing held en banc. The withdrawn opinion now appears in substance as the concurring opinion of Judges Hastie and Kalodner." 6 Moore's Federal Practice, page 222, footnote 16 (Rev. Ed., 1953).

[8] **Appendix A, infra, page 7a.**

[9] **Flegenheimer v. General Mills, 191 F. 2d 237, 241 (C.A. 2).**

enters an order as to one or more but less than all of the claims and invokes "• • • the talismanic language prescribed by Section 54(b) • • •,"[10] a final, appealable order is automatically and conclusively created conferring immediate appellate jurisdiction which cannot be questioned by the courts of appeals.

The opposing view taken in the Second and District of Columbia Circuits is that the finding of a district court judge cannot be given this conclusive effect and that the courts of appeals must make their own independent determination in the light of the decided cases as to whether a final order has in fact been entered and as to whether they therefore do or do not have appellate jurisdiction. Under this view it is argued that had the Supreme Court intended the "strange anomaly"[11] of having district court judges determine the jurisdiction of the courts of appeals, it would have expressed itself directly and not have relied upon an oblique construction of language of negation contained in a rule of district court procedure. It is argued further that if the Supreme Court did intend this result, then the Supreme Court may well have exceeded its rule-making powers by extending the boundaries of appellate jurisdiction laid down in Section 1291 of Title 28 of the United States Code.[12]

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[10] **Bendix Aviation Corp. v. Glass, 195 F. 2d 267, 277 (C.A. 3), Appendix C, infra, page 13a.**

[11] **Flegenheimer v. General Mills, 191 F. 2d 237, 241 (C.A. 2).**

[12] **Pabellon v. Grace Line, 191 F. 2d 169, 176 (C.A. 2, concurring opinion); Bendix Aviation Corp. v. Glass, 195 F. 2d 267, 281 (C.A. 3, concurring opinion), Appendix C, infra, page 20a.**

2. The Importance of the Questions Involved.

Probably the best evidence of the importance of the jurisdictional issue raised in this case is the serious conflict which has developed among and within the courts of appeals and the many lengthy majority and dissenting opinions which have been written analyzing it in great detail. Under rules permitting liberal joinder of causes of action and parties, a resolution of the issue is of paramount importance in determining at what point in trial proceedings there is appellate jurisdiction to review orders of the district courts. Of equal or greater importance is the possibility that the interpretation given Rule 54(b) by the court below in this case and by the First and Third Circuits may be one which renders the Rule invalid as expanding the boundaries of appellate jurisdiction set by Congress in 28 U.S.C. Sec. 1291. Since the conflict has developed over the proper interpretation to be given to a Rule promulgated by the Supreme Court, it is peculiarly within the province of the Supreme Court to elucidate what it intended the effect of the Rule to be.

3. The Decision of the Court Below Is Believed to Be Erroneous.

In the light of the detailed opinions written by distinguished judges giving their reasons for believing that the interpretation of Rule 54(b) followed by the court below in this case is erroneous, it would be superfluous to attempt to add anything at this time. Perhaps the fullest exposition of the arguments against the decision of the court below in this case is contained in the special concurring opinion of Judge Hastie in *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 277 (C.A. 3), and, for this reason, the opinion is reproduced in full, *infra*, page 12a. (Appendix C). Judge Learned Hand's analysis is to be

found in *Flegenheimer* v. *General Mills*, 191 F. 2d 237 (C.A. 2). Judge Frank's analysis is to be found in his concurring opinion in *Pabellon* v. *Grace Line*, 191 F. 2d 169, 176 (C.A. 2). It is humbly submitted that views expressed by these judges are correct and that the decision of the court below in this case is erroneous.

4. The Interlocutory Nature of the Order Entered By the Court of Appeals in This Case Has Little Bearing Upon The Granting of This Petition For Writ of Certiorari.

There can be no question that under the certiorari jurisdiction of the Supreme Court to grant petitions for certiorari either "before or after rendition of judgment or decree",[13] the within petition can be granted. As this Court has stated, it is not a question of power but of propriety.[14] The Supreme Court has not hesitated in the past to grant petitions for writ of certiorari from interlocutory decrees or orders where the importance of the question and conflict among the courts of appeals have warranted it.[15] Specifically, it has granted certiorari to review interlocutory orders where important questions of federal procedure have been involved.[16]

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[13] 28 U.S.C. Sec. 1254(1).

[14] **Forsyth v. Hammond, 166 U.S. 506.**

[15] **American Construction Co. v. Jacksonville T. & K. W. R. Co., 148 U.S. 372. (Cert. granted to test the validity of an interlocutory decree affirmed in the Circuit Court where trial judge sat on the appeals court). Land v. Dollar, 330 U. S. 731. (Cert. granted to review order of court of appeals reversing and remanding a case to district court after district court had dismissed complaint for lack of jurisdiction). Stack v. Boyle, 342 U. S. 1. (Cert. granted to review Circuit Court's affirmance of district court order denying a motion to reduce bail).**

[16] **Hickman v. Taylor, 329 U. S. 495. (Cert. granted to determine scope of pre-trial discovery under Federal Rules of Civil Procedure). Sibbach v. Wilson & Co., 312 U.S. 1. (Cert. granted to determine the validity of Rules 35 and 37 of the Federal Rules of Civil Procedure).**

Of primary importance is the fact that if this petition is not entertained at this time it will almost certainly not come up again. The motion to dismiss the appeal made by petitioner in the court below was made in compliance with a rule of the Seventh Circuit which specifically provides for the raising of jurisdictional issues on preliminary motion.[17] If certiorari is not granted now and the Court of Appeals affirms the decision of the District Court on the merits in dismissing portions of the complaint, plaintiffs who took the appeal will certainly not be in a position to urge in the Supreme Court that the Court of Appeals lacked appellate jurisdiction. If the Court of Appeals reverses the District Court and remands the case for trial such an order will be no less interlocutory than the one just entered by this Court, and, as a practical matter, defendant would be unlikely to petition for certiorari on the jurisdictional point after the Court of Appeals' views on the merits had been made known. If the case comes up again after final adjudication by the trial court, then the entire jurisdictional point based upon questions of finality of intermediate orders will be moot. Thus, if the question of appellate jurisdiction under Rule 54(b) is ever going to be resolved by the Supreme Court it must be brought before it at precisely the stage at which these proceedings now are. The ruling and opinion of the court below squarely raise the issue over which the various courts of appeals have differed. Until the Supreme Court resolves the issue, the confusion and conflict over the proper scope of Rule 54(b) can only get worse.

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[17] "Whenever it appears that there is a substantial jurisdictional question in a cause pending on appeal, such question may be raised by either party by motion, filed in accordance with Rule 19, to determine the issue as to jurisdiction in advance of hearing on the merits. * * *" Rule 18(b) of the Rules of the United States Court of Appeals for the Seventh Circuit.

CONCLUSION.

It is submitted that in view of the importance of the questions raised here with respect to federal appellate jurisdiction, in view of the serious conflict that has developed among the courts of appeals and in view of the fact that this is the most desirable stage and, indeed, probably the only stage of the proceedings at which the issue can be presented to the Supreme Court for decision, this petition for writ of certiorari should be granted.

Respectfully submitted,

LEO H. ARNSTEIN,
HERBERT E. RUBEN,
FRANK H. MARKS,
Counsel for Petitioner.

February 23, 1955.

APPENDIX A.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 11225

BRUCE A. MACKEY,
Plaintiff-Appellant,

vs.

SEARS, ROEBUCK & CO., a New York corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable
Julius J. Hoffman,
Judge Presiding.

MOTION

Now Comes Defendant-Appellee, Sears, Roebuck & Co., a corporation, by Leo H. Arnstein and Herbert E. Ruben, its attorneys, and moves the Court as follows:

(1) To dismiss the appeal taken herein for lack of a final and appealable order meeting the requirements of Title 28 U.S.C.A. Sec. 1291.

(2) In the event that this Court should not grant Paragraph (1) of this Motion, to extend the time for Appellee to file its Brief on this appeal to thirty (30) days after the Order of Court is entered denying Paragraph (1) of this Motion.

(3) In any event, to postpone oral argument on the within appeal until the January, 1955, Session of this Court.

In support of this Motion, the attached Memorandum of Law and Affidavit are made a part hereof.

.....
Leo H. Arnstein

.....
Herbert E. Ruben
Attorneys for Sears, Roebuck & Co.,
Defendant-Appellee.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11225. OCTOBER TERM, JANUARY SESSION, 1955.

BRUCE A. MACKEY, Individually and TIME SAVER TOOLS, INC., an Illinois corporation,
Plaintiffs-Appellants,
vs.
SEARS, ROEBUCK AND CO., a New York corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 18, 1955.

Before DUFFY, *Chief Judge*, MAJOR and SWAIM, *Circuit Judges.*

DUFFY, *Chief Judge.* The complaint herein containing six counts was filed by two plaintiffs, Bruce A. Mackey, an individual, and Time Saver Tools, Inc., a corporation, which was wholly owned by Mackey. They will hereinafter be referred to as plaintiff. The complaint alleged that since 1949 Sears had directed a course of predatory conduct successively at three business ventured carried on by plaintiff: (1) by localized price-cutting, it destroyed his lamp business; (2) by use of threatened boycott, induced a breach of plaintiff's contract for commissions with "Vascoloy", and (3) is attempting to destroy his tool business by means of unfair competition.

Count 1 alleges a deliberate and announced plan by Sears to destroy plaintiff's business activities, and that such a plan is violative of the Sherman Act and § 3 of the Robinson-Patman Act. In this count, plaintiff seeks treble damages and equitable relief under the Clayton Act. Counts 2, 3 and 4 are common law counts. In count 2 plaintiff seeks damages for the intentional destruction of his lamp business. In count 3 plaintiff seeks damages for defendant's inducement of the breach of his commission contract with "Vascoloy". In count 4 plaintiff seeks damages for unfair competition. Count 5 was a claim by Time Saver under § 2(f) of the Robinson-Patman Act. However, this count was abandoned by plaintiff after the decision by the Supreme Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61. Count 6 alleges defendant's entire predatory program was actionable under common law.

Defendant moved to dismiss the entire complaint. Later, defendant filed an answer to count 3 together with an amended motion to dismiss the balance of the complaint. The District Court ordered counts 1 and 2 to be stricken without leave to amend, and found that there was no just reason for delaying the final determination of the issues raised by these counts, and directed that judgment be entered thereon against plaintiff. The Court also struck count 4 but granted plaintiff leave to amend, which was done, and this count is now at issue. The Court struck all of the allegations of count 6 except the portion which realleged the facts covered by Count 3.

Plaintiff appeals from the order and judgment dismissing portions of the complaint without leave to amend. The appeal, in effect, challenges the holding of the District Court that the facts alleged in Counts 1 and 2 do not state, and could not be amended to state, a claim upon which relief can be granted.

Defendant moved to dismiss the appeal on the ground that the order and judgment appealed from is not a final or appealable order under the requirements of § 1291, Title 28, U. S. Code. This section provides: "The courts

of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *" Certain exceptions to this rule provided in § 1292 are not here applicable.

Because of the importance of the questions raised by the motion to dismiss the appeal, we set the motion down for oral argument after briefs had been submitted. In deciding whether the District Court entered a final decision, we must interpret Rule 54(b), Federal Rules of Civil Procedure.

Prior to September 1, 1938, the effective date of the Federal Rules of Civil Procedure, the order in this case would not have been appealable, because it did not dispose of all of Mackey's claims against Sears, *Collins* v. *Miller*, 252 U. S. 364. As originally adopted, Rule 54(b) authorized the entry on one claim in a multiple claim suit, when the issues material to that claim and all counterclaims arising out of the same transaction or occurrence, had been determined. The validity of the rule in its original form was upheld in *Reeves* v. *Beardall*, 316 U. S. 283.

Amended Rule 54(b) provides: "*Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims, shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

A conflict has arisen among the various courts of appeals as to the effect to be given to this rule. We find the First and Third Circuits lined up on one side holding generally that where an order has been entered by a district

court judge, where, as was done in the case at bar, he makes a "determination",[1] jurisdiction is automatically and conclusively conferred upon the courts of appeals to hear the appeal. However, the Second Circuit and the Court of Appeals of the District of Columbia have reached a contrary conclusion, holding, in effect, that the courts of appeals are required to make an independent determination as to whether the order in question was, in fact, a final order. This Circuit has not previously passed directly on the question, although there was discussion of the effect of the amended rule in *Winsor* v. *Daumit,* 179 F. 2d 475.

The first case to discuss the proper interpretation to be given to Rule 54(b) as amended was *Pabellon* v. *Grace Line, Inc.,* 2 Cir., 191 F. 2d 169. The panel considering this case was Judges Chase, Clark and Frank, Judge Clark writing the opinion for the Court. It was held that an order dismissing a third party complaint was an appealable order where the district court had complied with the requirements of Rule 54(b). The Court agreed that the appeal taken in that case would have been proper even prior to the amendment of Rule 54(b), but Judge Clark stated that the district court, by making a determination that there was no just cause for delay and that he was entering a final order under Rule 54(b) relieved the Court of Appeals from the task of making an independent analysis to determine whether or not the order was, in fact, final and appealable. Judge Frank, in a concurring opinion, took issue with Judge Clark's interpretation of Rule 54(b) stating that such an interpretation would render the rule invalid as beyond the statutory power of the Supreme Court.

Eight days after the decision of the Second Circuit in the *Pabellon* case, another panel of that court consisting of Judges Swan, Augustus Hand and Learned Hand, in *Flegenheimer* v. *General Mills,* 191 F. 2d 237, held in accordance with the view previously expressed by Judge

[1] The term "determination" includes "the express determination that there is no just reason for delay" and also the "express direction for the entry of judgment."

Frank in the *Pabellon* case. The Court held that no appealable order had been entered, and decided that it was the duty of the appellate court to determine its own jurisdiction and that such jurisdiction could not be controlled by the finding of a district court judge. Thereafter, in *Lopinsky* v. *Hertz Drive-UR-Self Systems, Inc.*, 194 F. 2d 422, Judge Clark vigorously defended the view that he had previously expressed in the *Pabellon* case.

The same question came before the Court of Appeals of the Third Circuit in *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267. In that case a counterclaim was dismissed and the District Court made the requisite "determination" under Rule 54(b) that there was no just reason for delay and that final judgment be entered. The case was finally heard before the entire court sitting *en banc*, and it was held, with two judges dissenting, that the effect of Rule 54(b) was to render conclusive insofar as the jurisdiction of the court of appeals was concerned, the finding of the district judge that a final appealable order was being entered. Shortly thereafter the Court of Appeals for the First Circuit, in *Boston Medical Supply Co.* v. *Lea & Febiger*, 195 F. 2d 853, in an opinion by Chief Judge Magruder, stated that the First Circuit was in full agreement with the opinion of the Third Circuit in *Bendix Aviation Corp.* v. *Glass, supra.* More recently the Court of Appeals for the District of Columbia in *Gold Seal Co.* v. *Weeks*, 209 F. 2d 802, in an opinion by Chief Judge Stephens, followed the rule laid down by the Second Circuit in the *Flegenheimer* case.

Thus we find not only courts of appeals of two circuits opposing the view adopted by the courts of appeals of two other circuits, but we find panel opposed to panel in the Second Circuit and a vigorous dissent by two judges in the Third Circuit. Also, Professor Moore strongly espouses the views of Judge Clark insisting that such views properly reflect the intent of the draftsmen of the 1948 amendment to Rule 54(b). *Moore's Federal Practice*, (Second Edition, 1953), Vol. 6, pp. 228-230. It is of interest to note that Professor Moore was active in formulating and drafting the amended rule (*Pabellon* v. *Grace Line*,

Inc., 191 F. 2d 169, 173) and, of course, Judge Clark was the reporter of the Advisory Committee which recommended the amended rule to the Supreme Court.

It would seem that the Supreme Court should promptly decide the important question here at issue in order to reconcile the divergent and conflicting views which have developed among and within the circuits. The question is constantly recurring. An early decision by the Supreme Court would be most helpful.

The Second and District of Columbia Circuits have adopted a negative approach in interpreting the rule. They say that if, in a multiple claim suit, a trial judge fails to enter a "determination", then, although otherwise the order would have been appealable under § 1291 it remains interlocutory and non-appealable; that thus interpreted the rule does not alter the jurisdiction of the appellate courts as fixed in §§ 1291 and 1292. They argue further that the jurisdiction of a court of appeals cannot rest on a district court's decision as to whether or not he will enter a "determination" described in Rule 54(b).

We think the interpretation announced by the First and Third Circuits is correct. We feel certain that such was the understanding of the Advisory Committee as so well stated by Judge Clark and Professor Moore. We find ourselves in agreement with the following statement in the opinion of the *Bendix Aviation Corp.* case, 195 F. 2d 267, 269, 270: "* * * We read that rule, as embodied in amended Rule 54(b), to be that in a multiple claims case the judgment which finally adjudicates all the claims is the only judgment having finality unless the district court in the exercise of its discretion expressly determines that there is no just reason for delay with respect to the entry of a final judgment upon a particular claim in the action and accordingly expressly directs the entry of a final judgment adjudicating that claim. In such case the rule says that 'the court may direct the entry of a final judgment.' This is language of grant not of restriction and it requires that the judgment thus entered on a single claim is to be regarded as just as final, so far as further

revision by the district court is concerned, as though the claim thus adjudicated were the sole claim for relief embodied in a wholly independent action. For when such a judgment has been entered it may at once be enforced and executed, unless enforcement is stayed by the court under Rule 62(h)."

Section 1291 makes all final decisions appealable. The statute does not define the phrase "final decision". We have held that the new rules have the effect of statutes. *Winsor* v. *Daumit, supra,* p. 477. In that opinion we pointed out "* * * and if there is a conflict between a procedure provided in an earlier Act of Congress and that provided by the rules, the former must yield to the latter, * * * for the Act of Congress under which the rules were authorized expressly provided that, after they became effective, any laws in conflict therewith would no longer be of any force or effect."

We agree that in one sense the jurisdiction of a court of appeals is at least indirectly affected by an order or judgment with a "determination" under Rule 54(b). But, in a somewhat similar manner, our jurisdiction was often affected by Rule 73(a) whereby the time was shortened for taking an appeal, yet we had no difficulty in upholding and enforcing that rule. *Ray, et al.* v. *Morris, et al.,* 170 F. 2d 498.

In his concurring opinion in *Lopinsky,* 194 F. 2d at 428 Judge Clark refers to a number of the rules in the Federal Rules of Civil Procedure, while referring directly to district court practice, do have some consequential effect on when courts of appeal might consider the issues. As far as we are advised, the validity of these rules has not been questioned because of the effect on when a court of appeals may pass upon the issues. We have no difficulty in applying the positive approach in interpreting Rule 54(b).

In our judgment the negative operation of Rule 54(b) affects appellate jurisdiction just as much as the positive approach. In either case the district judge is timing his final decision on less than all of the claims in a multiple claim suit. Under either approach, the jurisdiction of the

court of appeals is indirectly affected. We think that the rule-making authority of the Supreme Court existed as to all procedural matters and activities in the district court even though they might consequently affect appellate jurisdiction.

Our decision herein, is in accord with our statement in *Winsor* v. *Daumit*, *supra* p. 478: "We think, also, that the rule should not be considered as curtailing appellate jurisdiction but rather as one fixing the procedure of the district court as to conditions affecting terms upon which an appeal may be taken in advance of a determination of the entire case."

In view of our decision it is not necessary to decide the point much discussed in the briefs as to whether the order and judgment entered herein would have been final and appealable prior to the 1948 Amendment of Rule 54(b).

The motion to dismiss the appeal is

DENIED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Tuesday, January 18, 1955

Before

Hon. F. Ryan Duffy, Chief Judge

Hon. J. Earl Major, Circuit Judge

Hon. H. Nathan Swaim, Circuit Judge

No. 11225

BRUCE A. MACKEY, Individually and TIME SAVER TOOLS, INC., An Illinois Corporation,

Plaintiffs-Appellants.

vs.

Sears, Roebuck and Co., a New York Corporation,

Defendant-Appellee.

Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

This matter comes before the Court on a motion to dismiss appeal, answer thereto, and memorandum briefs, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by the Court that the motion to dismiss this appeal be, and the same is hereby, denied.

APPENDIX B.

STATUTES AND REGULATIONS INVOLVED

Rule 54(b) of the Federal Rules of Civil Procedure (28 U. S. C., Rule 54(b)) is set out in full in the text of this Petition, *supra*, at page 3.

Section 1291 of Title 28 of the United States Code entitled "'Judiciary and Judicial Procedure'' (62 Stat. 929, 28 U. S. C., § 1291) reads as follows:

> "**Final decisions of district courts.** The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 2071 of Title 28 of the United States Code entitled "Judiciary and Judicial Procedure" (63 Stat. 104, 28 U. S. C., § 2071) reads as follows:

> "**Rule-making power generally.** The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

APPENDIX C.

The following is the specially concurring opinion in full of Judges Hastie and Kalodner in *Bendix Aviation Corp. v. Glass*, 195 F. (2d) 267 (C. A. 3), commencing at page 277:

Judge Kalodner and I concur in the decision of the court that the judgment of the district court should be affirmed. However, we think that this court has jurisdiction of this appeal under Section 1292 (1) of Title 28, United States Code, not Section 1291 of Title 28 as the court holds.

Originally, this case was presented as an appeal under Section 1291 from a final decision of a district court. On rehearing it was urged, alternatively, that this is an appeal from an order which "refuses an injunction"; hence the order, if not a final decision, is nevertheless reviewable under Section 1292(1) which provides that an interlocutory order refusing an injunction is appealable to this court. In our opinion this alternative contention is sound. It enables us to agree that we have jurisdiction of this appeal. The court finds it unnecessary to consider this alternative basis of jurisdiction. We, however, must consider it since we think Section 1291 is inapplicable.

As concerns the present litigation, the enforced dismissal of plaintiff's claim, though without prejudice, was an effective denial of all relief for which plaintiff had asked. One of plaintiff's two specific prayers asked that defendant be restrained from dealing with an invention as his own property. In dismissing the claim the district court necessarily decided that plaintiff was not entitled to that relief. In recognition of that aspect of the order of dismissal this court in the concluding paragraph of its opinion states our reasons for believing that plaintiff is not entitled to an injunction in this suit. Thus, we have a case within the normal conception of appeal from an order re-

fusing an injunction as authorized by Section 1292(1) of Title 28.[1]

On the merits, Judge Maris speaks for us.

But despite our vote for affirmance, it seems to Judge Kalodner and me that the question of the effect of Rule 54(b) on our jurisdiction under Section 1291 is of such importance that we should state in some detail our reasons for disagreeing with the opinion of the court on this point. The view to which we are persuaded has recently been elaborated in opinions expressing the thinking of a majority of the judges of the Court of Appeals for the Second Circuit.[2] Their reasoning considered, we are not sure that we can shed additional light upon the problem; but we are sure that in the effort and in the exposition of our minority views here, we can and shall avoid the heat generated elsewhere in connection with minority views on the other side of this question.

At the outset, it is conceded that the majority give us a simple working rule for the entertaining of partial appeals in cases involving "multiple claims". Hereafter, in any such case, within this circuit at least, if a district court says its order is a final judgment and says it in the talismanic language prescribed by Section 54(b) of the Rules of Civil Procedure[3] the order is an appealable "final

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[1] General Electric Co. v. Marvel Rare Metals Co., 1932, 287 U.S. 430, 53 S. Ct. 202, 77 L.Ed. 408; Ward Baking Co. v. Weber Bros., 3 Cir., 1916, 230 F. 142; Drittel v. Friedman, 2 Cir., 1946, 154 F. 2d 653. Contrast the more limited effect of the order involved in Morgenstern Chemical Co. v. Schering Corp., 3 Cir., 1950, 181 F. 2d 160.

[2] The opinion of Judge Learned Hand, for himself, Chief Judge Swan and Judge Augustus Hand, in Flegenheimer v. General Mills, 2 Cir., 1951, 191 F. 2d 237, and the separate opinion of Judge Frank in Pabellon v. Grace Line, 2 Cir., 1951, 191 F. 2d 169, 176. The contrary views of Judges Chase and Clark appear in Judge Clark's opinion in Pabellon v. Grace Line, supra, and more recently have been elaborated in Judge Clark's separate opinion in Lopinsky v. Hertz Drive-Ur-Self Systems, 2 Cir., 1951, 194 F. 2d 422. Judge Medina did not sit in any of these cases.

[3] "Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. * * *"

decision" within the meaning of Section 1291. Nothing more need be considered. But simple and attractive as this end result is, we are unable to surmount the obstacles which beset the path our brethren have travelled.

We all agree, as our earlier decisions have stated,[4] that Section 1291 of Title 28 is the source of our appellate jurisdiction and that our problem here is whether a particular order of the district court is a "final decision" within the meaning of Section 1291. We also agree that until the adoption of the present Rule 54(b) the order here presented for review would not have been a final decision within the meaning of Section 1291. Now, however, by force of that Rule the court decides that Section 1291 embraces what it did not embrace before. The court rationalizes and minimizes the effect thus claimed for Rule 54 (b) by saying that the jurisdiction given this court by Section 1291 has not been altered but that the Rule has changed the impact of Section 1291. There has never been any more to the conception of final decision under Section 1291, it is argued, than a requirement that an order not be subject to revision by the trial court and that it be capable of immediate enforcement by execution or otherwise. All along the vice which made an order unappealable under Section 1291 was that actually, or in legal contemplation at least, the district court had not finished even with the part of the suit covered by the order. When Rule 54(b) provided procedure definitive of the completion of a portion of the litigation then, for the first time, such partial decision came to meet the unchanged standard of Section 1291.

We think this is too narrow a view of the meaning of Section 1291. It is true that one effect of the statute has been to preclude appeal where the order in question is subject to revision. But the statutory concept and its effect have been broader.[5] Generally, and we think correctly,

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[4] E. g., Cohen v. Globe Indemnity Co., 1941, 120 F. 2d 791; Canister Co. v. National Can Corp., 1947, 163 F. 2d 683.

[5] Catlin v. U. S., 1945, 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911; Collins v. Miller, 1920, 252 U.S. 364, 40 S. Ct. 347, 64 L. Ed. 616; Ex parte National Enameling & Stamping Co., 1906, 201 U.S. 156, 26 S. Ct. 404, 50 L.Ed. 707; Hohorst v. Hamburg-American Packet Co., 1893, 148 U.S. 262, 13 S. Ct. 590, 37 L. Ed. 443.

Section 1291 has been thought to reflect a policy against the waste of time of appellate courts and against other evils inherent in the piecemeal presentation of related issues for review. It is obvious that multiple appeals in a single suit are likely to compel the reviewing court to go over much ground more than once. And even if this is avoided, there is the equally serious danger that on partial appeal issues may not appear as clearly or in the same perspective as when the whole litigation is reviewed. It was arguable as a matter of first impression that Section 1291 carried this policy so far that any appeal was precluded until the whole litigation was finished in the trial court.[6] But the Supreme Court in its construction of the statute occasionally found a portion of a law suit so distinct from the rest that the normal dangers of partial appeal were not present; where both in logic and in terms of the policy of Section 1291 that portion of the litigation might be reviewed as if it were a separate law suit. But these exceptions were few. And they were recognized cautiously in cases where the result seemed clearly consistent with the fundamental policy of Section 1291.[7]

On the other hand, if there was one situation where the restrictive policy embodied in the statute clearly precluded partial appeal, it was the case where plaintiff's claim was opposed by defendant's "compulsory counterclaim".[8] The case before us is a prime example. The plaintiff's claim asserts rights of equitable character which he thinks he has against the defendant in relation to a particular invention as a result of certain acts and relationships of the parties. Defendant's counterclaim asserts his alleged rights of legal character against plaintiff in connection with the same invention and as a result of the same acts and relationships. Whether there may be particular bits of evi-

[6] Countervailing special considerations of policy have resulted in the allowance of appeal from specified interlocutory orders under Section 1292 of Title 28. They are not relevant to the present argument.

[7] Withenbury v. U. S., 1866, 5 Wall. 819, 18 L.Ed. 613; Hill v. Chicago & Evanston R. R. Co., 1891, 140 U.S. 52, 11 S. Ct. 690, 35 L.Ed. 331; United States v. River Rouge Improvement Co., 1926, 269 U.S. 411, 46 S.Ct. 144, 70 L.Ed. 339. Compare Dickinson v. Petroleum Conversion Corp., 1950, 338 U.S. 507, 70 S.Ct. 322, 94 L.Ed. 299.

[8] The terminology now used in Rule 13 of the Federal Rules of Civil Procedure, 28 U.S.C., to describe a situation long familiar in pleading.

dence relevant to the claim and not the counterclaim, or vice versa, does not appear but does not matter. Essentially the same circumstances are the factual basis of both claim and counterclaim. The likelihood of pointless redundancy in such separate appeals on claim and counterclaim arising out of the same transaction was clear. Therefore, whether the district court had finished with the claim or not was immaterial. For until the counterclaim also was decided, adjudication was not comprehensive enough to amount to final decision within the meaning of Section 1291.[9]

Thus, we differ with the majority in our view that it was the quantum of litigation covered by partial decision in the claim-compulsory counterclaim situation beyond any possible deficiency of procedure in connection with the matter decided which resulted in the rule of non-finality until both claim and counterclaim had been adjudicated.

This conception of final decision continued after the Rules of Civil Procedure were adopted in 1938. Rule 54 (b), as then enacted, recognized that an order disposing of a particular claim while a counterclaim "arising out of the [same] transaction" remained pending did not cover enough to constitute a final judgment. Such an order remained unappealable.[10]

At the same time, because more diverse matters could be brought together in one action under the new Rules than theretofore, the 1938 Rule 54(b) undertook to describe possible units of judicial action so distinct from the rest of the litigation as properly to be the subject of review before completion of the entire litigation. Appar-

[9] General Electric Co. v. Marvel Rare Metals Co., 1932, 287 U.S. 430, 53 S. Ct. 202, 77 L.Ed. 408; Winters v. Ethell, 1889, 132 U.S. 207, 10 S.Ct. 56, 33 L.Ed. 339; Ayres v. Carver, 1854, 17 How. 591, 15 L.Ed. 179. And see references to this antecedent doctrine in cases cited in note 10, infra.

[10] Nachtman v. Crucible Steel Co., 3 Cir., 1948, 165 F.2d 997; Eastern Transport Co. v. U. S., 2 Cir., 1947, 159 F.2d 349; Toomey v. Toomey, 1945, 80 U.S. App. D.C. 77, 149 F.2d 19. Accord: Coffman v. Federal Laboratories Inc., 3 Cir., 1948, 171 F.2d 94. Cf. Cohen v. Globe Indemnity Co., 3 Cir., 1941, 120 F.2d 791.

ently it was the intention of the draftsmen to respect the conceptions underlying adjudications which had defined "final decision" in the administration of Section 1291 before the liberalization of joinder.[11] For although language of the Supreme Court not essential to the disposition of issues before the court at times had suggested that any partial disposition of an action lacked the coverage contemplated by Section 1291,[12] actual adjudication before 1938 had recognized, as we already have indicated, the appealability of certain obviously integral portions of an action less than the entire litigation. It is not surprising, therefore, that after the adoption of the original Rule 54(b) the Supreme Court explicitly recognized "* * * a judgment * * * which terminates the action with respect to such a claim [including any compulsory counterclaim] * * * is final for purposes of appeal under § 128 [now Section 1291] of the Judicial Code".[13] Since this case, *Reeves* v. *Beardall,* is thought by the majority to lend support to their position, it seems desirable to state explicitly that it does not overrule any earlier decisions of the Court on the nature of final decision. Rather, in a situation which it had not considered before, the Supreme Court applied a conception of an appealable unit of litigation which was consistent both with the rationale of its earlier decisions construing Section 1291 and with the Rules newly enacted in connection with the liberalization of joinder. In contrast, the present case discloses an old and familiar situation of claim and counterclaim with reference to the same transaction. Within this quantum of litigation disposition of less than all of the closely related opposing requests for judicial action has not heretofore constituted final decision under Section 1291; and if it does so now the meaning of Section 1291 in relation to old and familiar subject matter has been changed.

The present Rule 54(b) is an entire re-draft adopted in 1948. It undertakes a new approach to finality in the dis-

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[11] See Moore, Judicial Code Commentary (1949) 510-11.

[12] E. g., Collins v. Miller, 1920, 252 U.S. 364, 370, 40 S.Ct. 347, 64 L.Ed. 616.

[13] Reeves v. Beardall, 1942, 316 U.S. 283, 285, 62 S.Ct. 1085, 1087, 86 L.Ed. 1478.

position of one of several claims presented in an action. An express special finding that "there is no * * * reason for delay" in the entry of judgment and "an express direction for the entry of judgment" by the district court are required as the hallmarks which must appear before an order which disposes of less than all of the claims in suit can be a final judgment. An obvious purpose of this new requirement is to provide such measure of certainty concerning appealability as is afforded by assurance that without these findings a partial disposition of a law suit is on its face incomplete and will not be appealable.[14]

The court reasons that there is no significant distinction between this negative effect—which all of us concede—of a district court's failure to comply with Rule 54(b) in postponing any Section 1291 final decision and the affirmative effect of converting into a Section 1291 final decision an order the Supreme Court has said is not of that character. In this same connection the court points out that every day district courts necessarily accelerate or postpone final decisions by promptness or delay in entering judgment upon trial findings and opinions. But this very example illustrates just the distinction which we already have stressed. When we speak of such procedural steps as postponing or accelerating final decision, it is our unspoken premise that, procedure apart, the adjudication covers such subject matter as is comprehended by the phrase "final decision" in Section 1291. In other words, two things are necessary for such a final decision. The district court must take all the steps necessary to complete its action with reference to the claim and, in addition, the subject matter litigated must have scope enough to satisfy the statutory conception of final decision.

Thus, the court's analysis of Rule 54(b) as procedural in the sense of changing the time when an order is appealable is beside the mark. Litigated cases characteristically involve numerous challenged rulings made before final decision, however defined. To call any such ruling itself

[14] Lyman v. Remington Rand, Inc., 2 Cir., 1951, 188 F.2d 306; David v. District of Columbia, 1950, 88 U.S. App. D.C. 92, 187 F.2d 204; Winsor v. Daumit, 7 Cir., 1950, 179 F.2d 475.

a final decision within the meaning of Section 1291 would, of course, change the time of appeal. But in this case it would also change the quantitative conception under which final decision must include disposition of both claim and compulsory counterclaim, whether by one order or two, and whether the orders, if two, are entered simultaneously or at different times. This distinct and additional effect which the court now gives to Rule 54(b) involves serious difficulties which, as we see it, the proponents of the majority view do not resolve.

It is at least a novel conception of judicial power which enables a court of first instance in its discretion from case to case to determine whether its orders are sufficiently inclusive to be of appealable character. The conception is the more remarkable in this case because it involves authority to change the meaning of a statute at will and in the process to ignore the Supreme Court's prior construction of that statute. Whether district courts of the United States organized and authorized solely to exercise certain original jurisdiction comprehended within the judicial power of the United States under Article III of the Constitution can exercise such a function is at least unclear.

Moreover, this sport in judicial power would derive from a mere rule of district court procedure. The Supreme Court has pointed out that the enabling act[15] under which the present rules were adopted "was purposely restricted in its operation to matters of pleading and court practice and procedure" leaving undisturbed "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute".[16] It is true that the rules derive authoritative character from Supreme Court sanction. It is also true that in final analysis it is the Supreme Court which in the course of adjudication from case to case lays down the principles and precepts which give authoritative construction and systematic meaning to the statutory con-

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[15] 48 Stat. 1064 (1934).

[16] See Sibbach v. Wilson & Co., 1941, 312 U.S. 1, 10, 61 S.Ct. 422, 424, 85 L.Ed. 479; Cf., Mississippi Publishing Corp. v. Murphree, 1946, 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185; Meek v. Centre County Banking Co., 1925, 268 U.S. 426, 45 S.Ct. 560, 69 L.Ed. 1028.

cept of appealable final decision. But it would be something else for the Court to undertake the alteration of this statutory concept of appealability through the promulgation of rules of district court procedure. Such a course would at least represent a departure from conventional and judicially approved notions of the nature and respective roles of legislation, adjudication and rule making.[17]

Although the opinion of the court does not analyze these difficulties, we think there is implicit recognition of their substantiality in the repeated denials by the draftsmen of the present Rules and the courts alike, including this court in this case, that the Rules generally or, 54(b) in particular, have any purpose or effect to enlarge judicial power or modify appellate jurisdiction.[18] This is a reasonable interpretation. It may well be a necessary one.[19] We would give it effect by refusing to read into Rule 54(b) the purpose or effect of empowering a district court to

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[17] Cf., Davidson Bros. Marble Co. v. U.S. ex rel. Gibson, 1909, 213 U.S. 10, 18-19, 29 S.Ct. 324, 53 L.Ed. 675; Hudson v. Parker, 1895, 156 U.S. 277, 284, 15 S.Ct. 450, 39 L.Ed. 424; both cited in support of the language of Sibbach v. Wilson & Co., supra, note 16. For the contrary view of a chief architect of the new rules, see Moore, Judicial Code Commentary (1949) 516-17.

[18] See Audi Vision, Inc., v. R.C.A. Mfg. Co., 2 Cir., 1943, 136 F.2d 621, 624, 147 A.L.R. 574; Hunteman v. New Orleans Public Service, Inc., 5 Cir., 1941, 119 F.2d 465, 466; 3 Moore Federal Practice (1st ed. 1938) 3155. Particularly noteworthy is the note of the Advisory Committee on Rule 54(b), 28 U.S.C.A. Federal Rules of Civil Procedure, page 118, stating the draftsmen's conception that the "historic rule in the federal courts [which] has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments" should be retained "and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule". And with optimism concerning the results of their highly competent labors they add "This is afforded by amended Rule 54(b) which re-establishes an ancient policy with clarity and precision". Whether in the light of subsequent events this is an over-estimation of the potential of a few words however well chosen for the simple solution of such a problem as this or an under-estimation of the capacity of judges for obfuscation, it is significant of the limited effect intended for the new rule.

The note is further significant in its revelation that experience with the earlier form of Rule 54(b) had shown a tendency to employ the rule, contrary to its intention, to enlarge the field of appeals from partial judgments not final under precedent conceptions. The new rule was conceived restrictively to avoid this consequence of its predecessor.

[19] Flegenheimer v. General Mills, supra, note 2. This holding was anticipated by comments of Judge Frank in Clark v. Taylor, 2 Cir., 1947, 163 F.2d 940, 951 note 12.

make an order partially disposing of an action a final decision when it does not decide enough to meet the requirements of Section 1291 as authoritatively construed. This restrictive interpretation would leave unimpaired the usefulness of Rule 54(b) which derives from its above mentioned negative effect. The rule would be left to serve a very valuable purpose, and apparently its principal intended purpose. It would relieve litigants of the risk of losing their right of appeal which heretofore has resulted from failure to take an immediate appeal from a partial disposition of an action under the mistaken belief that the order was not a final decision. For now, regardless of what an order must comprehend to have the scope essential to finality under Section 1291, it would not meet the procedural requirements of Rule 54(b) unless the district court had formally directed the entry of judgment and unless the court had made explicit what would normally be implicit in any attempted partial final judgment; namely, that there was in the view of the trial court no reason of fairness or administrative convenience for retaining jurisdiction over this adjudicated segment of the litigation until the entire action could be adjudicated and its disposition viewed as a total picture.[20].

Finally, we have noted but do not share the fears of our brethren and others that our view, if adopted, would jeopardize many other sections of the new Rules. Without burdening this opinion with an elaborate catalog of rules, it seems to us that nothing is claimed for other rules which presents difficulties equivalent to those encountered when Rule 54(b) is given the effect claimed for it in this case. There is, of course, a normal and proper effect which many rules exert upon appeals as a necessary consequence of their regulation of procedure in the district court. Rule 54(b) is effective in the same way. It is only the questionable additional effect which we would avoid by our construction of the Rule.

[20] See cases cited in note 14, supra.

Summarizing our analysis of the matter in question, it seems to us that there is a quantitative conception of final decision, as distinguished from the new procedural steps and policy findings in the district court now prerequisite for the entry of finally dispositive partial judgment, for which we must continue to look to Section 1291 as authoritatively construed. A finding of a district court that no just cause exists for delaying partial judgment, such as was made in this case, does not of its own force and without regard to the coverage of the dispositive order make a "judgment" entered pursuant thereto appealable, whatever the considerations may have been which induced the district court's conclusion. At most such considerations might have effect in persuading the Supreme Court to reconstrue Section 1291 and recognize some hitherto unformulated exception to the present general rule against partial appeals. But it is not our function to declare such exception in a situation where neither the holdings nor the reasoning of the Court in construing Section 1291 seem to permit it.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 34

SEARS, ROEBUCK AND CO., a New York corporation,
Petitioner,

v.

BRUCE A. MACKEY, individually, and TIME SAVER TOOLS, INC., an Illinois corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE PETITIONER.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 34

SEARS, ROEBUCK AND CO., a New York corporation,
Petitioner,

v.

BRUCE A. MACKEY, individually, and TIME SAVER TOOLS, INC., an Illinois corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The memorandum opinion of the District Court is set forth at pages 20-34 of the printed Record.[1] The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 218 F. 2d 295, and is also reprinted at R. 40-46.

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[1] Hereinafter "R" will designate the printed Transcript of Record from the Court below.

JURISDICTION.

The order of the Court of Appeals was entered on January 18, 1955 (R. 47). A petition for a writ of certiorari was filed on February 24, 1955, and was granted on March 28, 1955 (R. 47). The jurisdiction of this Court rests upon 28 U.S.C. Section 1254 (1), 62 Stat. 928 (1948).

QUESTIONS PRESENTED.

The following questions are presented:

(1) Does the dismissal of parts of a complaint by a district court judge with an express direction that a final order is being entered and an express determination that there is no just reason for delay, pursuant to Rule 54(b) as amended of the Federal Rules of Civil Procedure, automatically and conclusively create an appealable decision beyond review by the Court of Appeals to determine its own jurisdiction?

(2) If Rule 54(b) is construed so that the district court's order controls the determination of finality for purposes of appellate jurisdiction, does the Rule exceed the rule-making power of the Supreme Court of the United States in that it revises and modifies the requirements for jurisdiction of the Courts of Appeals set forth in Section 1291 of Title 28 of the United States Code?

STATUTES AND RULES INVOLVED

United States Code, Title 28 (Judiciary and Judicial Procedure):

Section 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court.

Section 2072. Rules of civil procedure for district courts.

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

* * *

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Federal Rules of Civil Procedure:

Rule 54. Judgments; Costs. (as originally promulgated, effective September 16, 1938)

* * *

(b) Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate

the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Rule 54. Judgment; Costs. (as amended December 27, 1946, effective March 19, 1948)

* * *

(b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

Rule 82. Jurisdiction and Venue Unaffected.

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

STATEMENT OF THE CASE.

The respondents, an individual residing in Illinois and an Illinois corporation wholly-owned by the individual, filed a complaint (R. 2-11) containing six counts against the petitioner, a New York corporation, in the United States District Court for the Northern District of Illinois, Eastern Division, on May 21, 1953. The jurisdiction of the District Court was invoked as to certain counts because of alleged violation of federal antitrust and patent laws; jurisdiction was invoked as to other, common law counts upon the ground of diversity of citizenship, under 28 U.S.C. 1332, the amount in controversy being in excess of $3,000.

In essence the complaint alleged that the petitioner had over a period of years since 1949 engaged in a planned course of conduct designed to drive the individual respondent out of any and all business ventures in which he was engaged, evidenced by overt conduct set forth in some half dozen allegations. By realleging these allegations singly and in combination, the respondents purported to state a variety of causes of action including violations of the antitrust laws, common law unfair competition, and patent infringement.

Count I of the complaint (R. 2-8), in twenty-three paragraphs of allegations, set forth alleged violations of the Sherman, Robinson-Patman, and Clayton Acts, and demanded treble damages and equitable relief under Section 4 of the Clayton Act. Count II (R. 8) was apparently based on a common law theory of unfair competition involving destruction of a lamp business; Count III (R. 9) was based on a common law theory of interference with contractual relations; Count IV (R. 9), on theories of patent infringement and unfair competition; Count V (R. 9-10), on anti-

trust theories; and Count VI (R. 10-11), on a composite theory of an improper course of business conduct. Each allegation of Count I, except those contained in paragraphs 1 (R. 2) and 23 (R. 8) of Count I was utilized in, and formed the basis of, the other counts of the respondents' original complaint.

Acting upon the petitioner's motion, as amended, to dismiss parts of the complaint (R. 11-17, 18-20), the District Court dismissed Counts I, II, and parts of Count VI without leave to amend. (R. 34-36). The District Court also struck Count IV with leave to amend. The respondents themselves abandoned Count V, and subsequently filed an amended Count IV, to which the petitioner has answered. The parties are now at issue in the District Court on Counts III, IV (as amended) and VI.

The District Court entered its order dismissing parts of the complaint with a finding that there was no just reason for delay and expressly directed the entry of judgment, in the form specified in Rule 54(b). (R. 34-36). Thereafter, on June 8, 1954, the respondents appealed to the United States Court of Appeals for the Seventh Circuit from that part of the order of the District Court dismissing parts of the complaint without leave to amend. (R. 36-38). On November 15, 1954, the petitioner filed a motion to dismiss the appeal on the ground that the finality requisite to appellate jurisdiction was lacking, notwithstanding the entry of judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure. (R. 39). On January 18, 1955, the Court of Appeals denied the petitioner's motion to dismiss the appeal upon the sole ground that the district court judge's order, because made in accordance with Rule 54(b), was conclusive as to the jurisdiction of the Court of Appeals (R. 40, 46). 218 F. 2d 295, 299.

The Court explicitly refused to examine the question of statutory finality as an issue apart from the effect to be given Rule 54 (b):

> "In view of our decision it is not necessary to decide the point much discussed in the briefs as to whether the order and judgment entered herein would have been final and appealable prior to the 1948 Amendment of Rule 54(b)."

218 F. 2d 295, at p. 299; R. 40, at p. 46.

SUMMARY OF THE ARGUMENT.

The power and authority of the Supreme Court of the United States to make rules for the district courts is limited to procedural matters by the Enabling Act, other Congressional statutes, and Constitutional considerations. In consequence, the Federal Rules of Civil Procedure for the district courts deal simply with district court procedure. This tautology, given scant recognition by the Court below, is basic to the interpretation of the individual Rules.

A corollary to the fundamental limitation of power is that the Federal Rules of Civil Procedure do not regulate or determine the jurisdiction of the courts of appeals. This Court in promulgating the Rules denied any intention therein to determine or revise the rules of appellate jurisdiction. Congress legislated upon appellate jurisdiction long ago, and it has recently affirmed the wisdom of the enacted standards of jurisdiction by reiterating past requirements in the new Judiciary and Judicial Procedure Title of the United States Code.

Nor do the Federal Rules purport to reallocate judicial power between district courts and courts of appeals, or to reverse the hierarchical relationship between these systems of courts. Nothing in the Rules provides, as a general principle, that the district courts shall decide legal questions of any sort for the appellate courts.

What the Rules do not do in general, they have not done in particular in Rule 54(b). Rule 54(b) as amended does no more than provide that a decision cannot be final if the district court refuses to relinquish its grip on the matter. Relinquishment may be formally noticed and accomplished if the court finds no just reason for delay and directs entry of judgment. But if the district court indicates that it wishes to withhold its ultimate decision by not entering this kind of order, clearly the decision is not ripe for appeal or, in the language of the governing jurisdictional statute, is not final. On the other hand, if the district court does release its decision pursuant to a Rule 54(b) form of order, the appellate court may then proceed to examine the decision for *other* elements of *statutory* finality. The language of the Rule does not limit the appellate court's review.

An interpretation which would go further, giving the district court judge power to confer jurisdiction on the appellate courts automatically and conclusively, would make the Rule invalid because in violation of federal statutes and the Constitution. Merely labelling such conclusive action "procedural", or describing it as action which "incidentally" affects appellate jurisdiction, does not disguise the radical jurisdictional shift proposed; in fact, proponents of the "broad" interpretation expose the inadequacy of the camouflage by arguing at the same time that the whole purpose of Rule 54(b) as amended is to avoid difficult questions of appellate jurisdiction at the court of appeals level. Interpreted to grant district courts power to determine appellate authority, the Rule would be, as Judge Learned Hand describes it, a "strange anomaly" indeed, resulting in a curious inversion of customary judicial practice, whereby the characterizations of district court judges would bind not only the courts of appeals but also the Supreme Court of the United States on the most funda-

mental kind of review of all, that of the jurisdiction of the appellate court itself.

Apart from invalidating the Rule, the "broad" interpretation adds as many dilemmas to the problems of appellate jurisdiction as it is supposed to solve. This result, of simply varying the incidence of difficulties, is hardly surprising. The mechanical transfer of power to determine finality only evades the issues inherent in the finality test. Thus, a "positive" interpretation of Rule 54(b) leads, among other things, to a restatement of the question of "finality", as such, to one of whether "multiple claims" exist permitting a Rule 54(b) order at all. Furthermore, this interpretation provides and can provide no satisfactory method for dealing with a trial judge's abuse of discretion under Rule 54(b).

To the extent that serious problems of appellate jurisdiction undoubtedly exist, they are not resolved by a simple "talismanic" incantation which passes all control over appeals to trial court judges. The real problems may be dealt with, as numerous jurists and competent publicists have observed, by allowing a measure of discretion over appeals to the courts of appeals, and perhaps by allowing a limited certification of questions by the district courts. Legislation in these directions has been proposed to Congress and is now being considered. This is a far more promising, to say nothing of far more valid, method of dealing with appellate jurisdiction problems. From any point of view, there is little to be said for fundamentally altering appellate jurisdiction by alleged improvements "secreted in the interstices"[2] of rules of district court procedure.

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[2] Sir Henry Maine's famous phrase, to describe the process by which rules of substantive law were tucked away in the Forms of Action, related of course to medieval practices in the evolution of the common law. See Maine, Early Law and Custom, p. 389 (1883).

ARGUMENT.

Preliminary Note.

The issues in this proceeding come to this Court thoroughly reviewed and analyzed in the opinions of the various courts of appeals which have taken a position. The petitioner has relied strongly upon the careful reasoning of Judge Learned Hand, set forth in *Flegenheimer* v. *General Mills,* 191 F. 2d 237 (2d Cir. 1951); Judge Frank, in concurring opinions in *Pabellon* v. *Grace Line,* 191 F. 2d 169, 176-181 (2d Cir. 1951), certiorari denied 342 U.S. 893, 96 L. Ed. 669 (1951), and *Rieser* v. *Baltimore & Ohio R. Co.,* —— F. 2d ——, 21 Fed. Rules Serv. 54b.4, Case 5 (2d Cir. June 9, 1955); and Judge Hastie, concurring in *Bendix Aviation Corp.* v. *Glass,* 195 F. 2d 267, 277-282 (3rd Cir. 1952).

I. Both the Language and the History of Rule 54(b) Support the View that the Rule Does Not and Was Not Intended to Permit the District Courts Conclusively to Fix Appellate Jurisdiction.

This Court has before it the question of the propriety of an appeal to a court of appeals from a district court, put in issue by a motion to dismiss the appeal. The Court of Appeals has held that it may not question the finality of an order issued in the form prescribed by Rule 54(b) of the Federal Rules of Civil Procedure. It is the petitioner's contention that Rule 54(b) is but a rule of procedure for the district courts and, reasonably interpreted, does not affect the power of the appellate courts to ascertain the factors necessary to their jurisdiction.

A. Congressional enactments have set a standard of "final decisions" for federal appellate jurisdiction.

To place the Rule in perspective, the statutory provision governing appellate jurisdiction, which long antedates the Rule, must be examined. Section 1291 of Title 28 of the United States Code grants to the courts of appeals "jurisdiction of appeals from all final decisions of district courts of the United States." In its requirement of finality, this provision reiterates a consistent standard for appellate review, which has been a part of the law since the First Judiciary Act of 1789 (1 Stat. 73).

The purposes of the test of finality have been variously expressed. In the words of Alexander Hamilton, Congress had reason to be concerned about an "unrestrained recourse to appeals, as a source of public and private nuisance." *The Federalist,* No. 81. A foremost objective of the jurisdictional statute has been to prevent piecemeal appeals on interlocutory matters, from the standpoint of avoiding both a clog on appellate dockets and delay and confusion in lower court proceedings. "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." Frankfurter, J., in *Cobbledick* v. *United States,* 309 U.S. 323, 325, 84 L. Ed. 783, 785 (1940). See also *Cantor* v. *American and Ocean Insurance Companies,* 3 Pet. 307, 318, 7 L. Ed. 688, 692 (1830); *Catlin* v. *United States,* 324 U.S. 229, 233-234, 89 L. Ed. 911, 916 (1945); *Baltimore Contractors* v. *Bodinger,* 348 U.S. 176,

99 L. Ed. 171 (1955); *AudiVision Inc.* v. *RCA Mfg. Co.*, 136 F. 2d 621, 624-625 (2d Cir. 1943). Among its advantages, the final decision rule permits trial judges freely to correct their own errors before the matter passes out of their hands, and prevents consideration of an appeal on a part of a case when the perspective of the whole may be necessary and lacking. See *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 278 (3rd Cir. 1952).

Despite the numerous decisions and varying opinions in individual cases presenting the issue of finality, there has been a general consensus on the need for two distinct elements of finality: (1) the subject matter of the appeal must be put beyond the power and control of the trial court, *i.e.*, the trial court must exhaust its will to decide an issue; and (2) the decision must conclude the litigation as to a complete "judicial unit", whether that unit be the entire case or one phase of a case so separate, distinct and unrelated to any other phase that it, in effect, constitutes a separate case within a case. *Life & Fire Insurance Co. of New York* v. *Adams*, 9 Pet. 573, 9 L. Ed. 234 (1835); *Covington* v. *First National Bank*, 185 U.S. 270, 46 L. Ed. 906 (1902); *Paducah* v. *Tennessee Telegraph Co.*, 229 U.S. 476, 57 L. Ed. 1286 (1913); *Collins* v. *Miller*, 252 U.S. 364, 64 L. Ed. 616 (1920); *Arnold* v. *United States*, 263 U.S. 427, 68 L. Ed. 371 (1923); *Market Street R. Co.* v. *Railroad Com. of Calif.*, 324 U.S. 548, 551, 89 L. Ed. 1171, 1176 (1945); *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 94 L. Ed. 299 (1950); *Rector* v. *United States*, 20 F. 2d 845, 872 (8th Cir. 1927); *Republic of China* v. *American Express Co.*, 190 F. 2d 334, 338-339 (2d Cir. 1951); *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 278 (3rd Cir. 1952).

Before the promulgation of the Federal Rules in 1938, there was little room for dispute over the second element

of finality—the determination of a distinct judicial unit susceptible of independent decision. Except for certain special situations, the courts required that, to be "final," a decision must terminate the entire case in virtually every aspect as to all parties. See *Collins* v. *Miller*, 252 U.S. 364, 64 L. Ed. 616 (1920); *Sheppy* v. *Stevens*, 200 F. 2d 946 (2d Cir. 1912); *Hohorst* v. *Hamburg-American Packet Co.*, 148 U.S. 262, 37 L. Ed. 443 (1893). This construction of the statutory language stemmed from cases arising under the limited joinder of causes of action and parties ordinarily possible during the regime of the Conformity Act (Act of June 1, 1872, c. 255, 17 Stat. 196). Even under the pre-Rules procedure, however, there was a recognition of the possibility that one part of an action might be so separate and distinct from the rest that it formed an appropriate judicial unit for final decision and appeal. See *United States* v. *River Rouge Co.*, 269 U.S. 411, 70 L. Ed. 339 (1926); *Collins* v. *Miller*, *supra*, at pp. 370-371 (L. Ed. at p. 616); *Cf. Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528 (1949).

B. The original Rule 54(b) simply allowed an application of the Congressional requirements to multiple claims cases.

With the adoption of the Federal Rules of Civil Procedure, federal practice changed to permit the liberal joinder of claims and parties, the pleading of a variety of counterclaims and cross-claims, and the use of impleaders, intervenors, and separate trials upon a single complaint. The new liberality in practice and procedure now admitted the ready possibility that a trial court was dealing with several distinct justiciable units, and original Rule 54(b) was devised to regulate the entry in the district courts of judgments which *might* be final for some

but not all judicial units. This original Rule read as follows:

> "*Judgment at Various Stages.* When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

In litigation that followed upon the promulgation of the original Rule, appeals were permitted only in those multiple claims cases where final decisions upon separate judicial units had been rendered. The validity of the Rule was upheld by the courts of appeals and finally by the Supreme Court in *Reeves* v. *Beardall*, 316 U.S. 283, 86 L. Ed. 1478 (1942). As this Court said in the *Reeves* case, the Rule simply made it clear that "differing occurrences or transactions * * * form the basis of separate units of judicial action," as to which final decision might be rendered. 316 U.S. at p. 285, 86 L. Ed., at p. 1480.

This development of the final decision requirement under the original Rule 54(b) amounted to no more than a general application of the principle of *United States* v. *River Rouge Co.*, 269 U.S. 411, 70 L. Ed. 339 (1926), heretofore of limited application under the old forms of practice. See *Reeves* v. *Beardall, supra*; *AudiVision Inc.* v. *RCA Mfg. Co.*, 136 F. 2d (2d Cir. 1943). It is not meaningful to say that the original Rule 54(b) made appealable

decisions on one of several claims which would not have been appealable before the Rule, inasmuch as "partial" decisions of the same character were not, except rarely, rendered in actions prior to the advent of Rules.

While the Rules contained within themselves a means whereby the district courts could make an initial separation of judicial units and decide upon them serially, the review of district court action for its effect on appellate jurisdiction naturally remained in the appellate courts. Under the original Rules, appeals proliferated due to uncertainty and confusion as to whether a district court had intended to make an affirmative "final" order and, even more, as to whether claims and counterclaims arose out of the same or different transactions or occurrences. See Notes of Advisory Committee to the 1948 Amendment to Rule 54(b), *Report of Proposed Amendments to the Federal Rules of Civil Procedure* (1946), pp. 70-72; *Wright* v. *Gibson*, 128 F. 2d 865 (9th Cir. 1942); *AudiVision Inc.* v. *RCA Mfg. Co.*, 136 F. 2d 621 (2d Cir. 1943); *Toomey* v. *Toomey*, 149 F. 2d 19 (D.C. Cir. 1945); *Libby-Owens-Ford Glass Co.* v. *Sylvania Indust. Corp.*, 154 F. 2d 814 (2d Cir. 1946), certiorari denied 328 U.S. 859, 90 L. Ed. 1630 (1946); *Clark* v. *Taylor*, 163 F. 2d 940 (2d Cir. 1947); *Munson Line* v. *Green*, 165 F. 2d 321 (2d Cir. 1948); 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.26, pp. 200-203.

C. The amendment to Rule 54(b) was intended to indicate clearly the time at which, in the view of the district court, an appeal should be taken.

The uncertainty about whether a given district court order was final made it necessary for the losing party to seek a prompt appeal from "partial" decisions; otherwise the right might be irrevocably lost because the time for

appeal had passed. *Cf. Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 94 L. Ed. 299 (1950); *Rector* v. *United States*, 20 F. 2d 845, 872 (8th Cir. 1927). Consequently, the compulsion to appeal imposed a burden upon parties and appellate courts beyond all reason. See Notes of Advisory Committee to the 1948 Amendment, *supra; Audi-Vision Inc.* v. *RCA Mfg. Co., supra.* In view of these difficulties, amendment of Rule 54(b) was undertaken in order to restrict appeals by stressing "the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence." Notes of Advisory Committee to the 1948 Amendment, *supra.*

The draftsmen responsible for amendment became discouraged in their initial attempts to resolve the difficulties inherent in the terms "claim", "counterclaim", and "arising out of a single transaction or occurrence." To escape from these problems of definition, they settled upon a simple rule of "discretion," whereby the form of the trial judge's order would reveal his intention See 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.01, pp. 7, 11-12. There can be little doubt that the amendment was "designed to reduce the likelihood of interlocutory appeals in cases not provided for by statute." Moore & Vestal, "Federal Appellate Procedure," 35 Va. L. Rev. 1, p. 6, note 18 (1949). As Justice Jackson observed, in a case arising shortly after the amendment which pointed up the most serious problem under the original Rule, "The obvious purpose of this section, as indicated by the notes of the advisory committee, is to reduce as far as possible the uncertainty and the hazard assumed by a litigant who either does or does not appeal from a judgment of the character we have here. It provides an opportunity for litigants to obtain from the District Court a clear state-

ment of what that court is intending with reference to finality, and if such a direction is denied, the litigant can at least protect himself accordingly." *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 512, 94 L. Ed. 299, 302 (1950).

In the *Dickinson* case, *supra*, a decree of the trial court dismissed a corporation-intervenor's equitable claim, filed in an action originally involving two individuals who claimed rights in the shares of the corporation. The corporation did not appeal from the original order of dismissal. Thereafter the district court proceeded to determine the rights of other parties, including the shareholders, and issued a second decree designated as final, from which the corporation appealed. The Supreme Court, acting under the original Rule 54(b), held that the *first* decree of dismissal was final as to the corporation, and that time for appeal had expired before the appeal was taken. Dissent in this case turned on a difference in view as to the finality of the respective decrees, Justice Black emphasizing the reservations of the district court judge in entering the earlier decree. See 338 U.S. at pp. 518-519, note 3, 94 L. Ed. at p. 306. Justice Black also doubted that even the amendment to Rule 54(b) had "charted a clear route through the jungle." 338 U.S. at p. 517, 94 L. Ed. at p. 305. Thus, in both majority and minority opinions in the *Dickinson* case, this Court attributed a limited purpose and effect to the new Rule 54(b), and expressed a qualified optimism regarding its role.

Judge Clark of the Court of Appeals for the Second Circuit has, upon at least one occasion, recognized a similar limited purpose in the revision of the Rule. "The value of the amendment to Rule 54(b) and its very real success to date depend upon its more or less automatic fixing of the attention of the trial judge upon this issue, more normally

within the perspective of the reviewing than the trial court, and its providing of a convenient guidepost that he can employ to make his intent clear." Concurring opinion in *Butler* v. *Ungerleider*, 187 F. 2d 238, 239 (2d Cir. 1951). See also *Creel* v. *Creel*, 184 F. 2d 449, 452 (D.C. Cir. 1950).

Nowhere does a review of the background of Rule 54(b) suggest that there was an intention on the part of the Supreme Court to give trial judges the power conclusively to decide the jurisdiction of appellate courts, or, put differently, to make a trial judge's characterization of his own order as "final" per Rule 54(b) an unreviewable determination. Nor is there any indication that the appellate courts, including this Court, were to be stripped of their inherent power to examine all the elements of their own jurisdiction.[3]

To the contrary, it is highly significant that in one of the early drafts of the original Rules—that of May, 1936—the following Rule was proposed:

"Rule 63. Judgments; Costs.

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"(b) *Judgments in Favor of and against Various Parties at Various Stages.* A judgment or a final order may be entered by the court upon any issue

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[3] We are not unmindful of the fact that leading members of the Advisory Committee, Judge Clark and Professor James Moore, have from time to time asserted more far-reaching objectives for the 1948 amendments to the Rule. However, we have based our conclusions on the drafts and reports of the Advisory Committee, and on this Court's own contemporaneous statement of the purpose of the amendment, made in the **Dickinson** case, rather than on the later recollections of individuals, however prominent in formulating the Rules. An "act of legislation is not the act of one legislator, and its meaning and purpose must be expressed in words." **Banco Mexicano v. Deutsche Bank**, 263 U. S. 591, 602, 68 L. Ed. 465, 469 (1924); see also **United States v. Wrightwood Dairy Co.**, 315 U. S. 110, 125, 86 L. Ed. 726, 736 (1942).

> or issues determined in favor of or against any party or parties at any stage of an action, and the action may proceed as to the remaining issues or parties as justice may require. *A judgment or order entered pursuant to this rule shall be final for all purposes, including the right to appeal therefrom.*" (Italics added.)

Preliminary Draft of Rules of Civil Procedure (May 1936), p. 109.

Here, indeed, was an explicit rule, at least as far as its effect upon an appellate court was concerned. The draft rule promptly provoked serious misgivings as to validity, because of its infringement on the expressed will of Congress with regard to the determination of appellate jurisdiction. See Miscellaneous Correspondence and Documents of the Advisory Committee,[4] particularly, letters to the Committee from Judge V. A. Griffith (July 12, 1936) from George F. Longsdorf, Esq. (August 5, 1936), from the Committee on the Rules for the Southern District of Texas (August 8, 1936), and from the District of Columbia Bar Association (August 18, 1936). As Professor Moore remarks, this rule might well have "materially enlarged" appellate jurisdiction. 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.21, p. 166. See also Judge Frank's concurring opinion in *Pabellon* v. *Grace Line*, 191 F. 2d 169, 177-178 (2d Cir. 1951), certiorari denied 342 U.S. 893, 96 L. Ed. 669 (1951). The proposed rule was therefore deleted, to be replaced by the original Rule 54(a). See *Report of Advisory Committee on Rules for Civil Procedure* (April 1937), p. 135.

In the light of this history it seems more than a little unlikely that the Supreme Court or the Advisory Com-

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[4] These materials, in mimeographed form, were examined by counsel for the petitioner at the Law Library of the University of Chicago, and are presumably available to both the Court in their original form and opposing counsel.

mittee sought to accomplish by indirection what they hesitated or feared to announce boldly and clearly.

D. The language of Rule 54(b) as amended does not confer on the district courts power to decide appellate jurisdiction.

While the history and context of the new Rule 54(b) points to its limited function as a rule of district court procedure, the meaning of the Rule is primarily "to be searched for in the words * * * employed to convey it." *Schooner Paulina's Cargo* v. *United States*, 7 Cranch 52, 60, 3 L. Ed. 266, 269 (1812). And the background of the Rule "must give way to its language." *Mackenzie* v. *Hare*, 239 U.S. 299, 308, 60 L. Ed. 297, 300 (1915). We must therefore ascertain whether the Rule by its terms clearly precludes appellate review of the jurisdictional elements required for appeals by Congress.

Rule 54(b) as amended provides:

> "*Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

The Rule appears in Part VII of the Rules, generally entitled "Judgment." It is well-separated from that part of the Rules, Part IX, dealing with "Appeals"; and no

rule of the "Appeals" Part makes cross-reference to Rule 54(b), although the "Appeals" rules do contain numerous cross-references to other rules.

The Rule itself covers, in sub-section (a), the form of judgments; in sub-section (c), the relationship of judgments to demands for relief; and in sub-section (d), matters of costs. In the midst of these pedestrian procedural surroundings, it is contended by respondents that, as Judge Learned Hand describes it, a revolutionary inversion in the determination of appeals has been wrought. See *Flegenheimer* v. *General Mills*, 191 F. 2d 237, 241 (2d Cir. 1951).

The language of Rule 54(b) does not encourage notions of a revolution in appellate jurisdiction. The Rule simply requires that if the district court makes (1) an "express determination that there is no just reason for delay", and (2) "an express direction for the entry of judgment", the court may enter a "final judgment" upon one or more of multiple claims. It then goes on to say that in the absence of such direction and determination, "any order or other form of decision * * * shall not terminate the action as to any of the claims", and the district court may revise its order or decision at any time before entry of judgment.

The words "final judgment" in the first sentence of the Rule refer obviously to no more than a judgment which the trial court judge *intends to make final as far as he can.* This term is not and cannot be the equivalent in meaning and effect to "final decisions" in Section 1291 of Title 28 of the United States Code, or to "final judgment" as used in Section 29 of Title 15, United States Code, and in Section 45 of Title 49, United States Code. The words have no definitive significance for appellate courts looking at their

own jurisdiction. The second sentence of the earlier draft Rule 63(b)—"A judgment or order entered pursuant to this rule shall be final for all purposes, including the right to appeal therefrom"—would have squarely raised the question whether the Rules were putting a new content and definition into the several jurisdictional statutes. But Rule 54(b) as amended makes no reference to effect on *appellate* courts or *appellate* jurisdiction. To accomplish the jurisdictional revolution, the respondents must perforce add back the missing language of Draft Rule 63(b), deleted for obvious reasons, to Rule 54(b) as amended.

In support of a narrower view, the phrase "final judgment" is amplified and explained in the next sentence of the Rule. This gives a wholly negative significance to the phrase in the first sentence. Absent the necessary formal steps—a determination and a direction—the order is not final in any sense; the district court has refused to let the decision in question out of its control. There is nowhere a provision conveying an affirmative meaning to "final judgment" which would bind an appeals court. Judge Learned Hand has summed up the meaning of the new Rule as follows:

> "This is language of restriction, not of grant; it sets limitations upon the district court's power to enter a 'final judgment'; nowhere in it can be found a suggestion that the judge can make that 'final' which was not 'final' before." *Flegenheimer* v. *General Mills*, 191 F. 2d 237, 241 (2d Cir. 1951).

As far as we have been able to ascertain, every court which has considered the matter recognizes the effectiveness of the Rule in its *negative* operation. *See, e.g., Etten* v. *Kauffman*, 179 F. 2d 302 (3rd Cir. 1950), certiorari denied 340 U.S. 931, 95 L. Ed. 672 (1951); *Winsor* v. *Daumit*, 179 F. 2d 475 (7th Cir. 1950); *David* v. *District of Columbia*, 187 F.

2d 204 (D.C. Cir. 1950); *Republic of China* v. *American Express Co.*, 190 F. 2d 334 (2d Cir. 1951; *Burkhart* v. *United States*, 210 F. 2d 602 (9th Cir. 1954); *Brandt* v. *Renfield Importers*, 216 F. 2d 206 (8th Cir. 1954). The reason is apparent. Where the trial court refuses to enter the direction or determination required by Rule 54(b), one essential element of finality is lacking. The district court's silence or refusal to enter a direction and determination are equivalent to a reservation of power to change the decision at a later date, and this kind of reservation has always been effective to establish the interlocutory rather than final character of a decision. See *Republic of China* v. *American Express Co.*, 190 F. 2d 334, 338-339 (2d Cir. 1951); *cf. Covington* v. *First National Bank*, 185 U.S. 270, 277, 46 L. Ed. 906, 908 (1902); *Paducah* v. *Tennessee Telegraph Co.*, 229 U.S. 476, 480, 57 L. Ed. 1286, 1288 (1913); *United States* v. *Fallbrook Public Utilities Dist.*, 109 F. Supp. 28, 43 (D.C. S.D. Calif. 1952).

In terms of the basic analysis of the elements of finality presented hereinabove,[5] the new Rule seeks simply to make certain the time as of which the district court "lets go" of its partial decision. Until the court releases its decision without reservation, or "finally", by appropriate determination and direction, a party may safely refrain from filing an appeal. *Cf. Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 94 L. Ed. 299 (1950); *Rector* v. *United States*, 20 F. 2d 845, 872 (8th Cir. 1927). The new Rule extends that "measure of certainty concerning appealability as is afforded by assurance that without these findings a partial disposition of a law suit is on its face incomplete and will not be appealable." Hastie, J., in his concurring opinion in *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 280 (3rd Cir. 1952).

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[5] See p. 12 of this brief.

If the court does release its decision, the adversely affected party is put on notice that the district court has finished in the matter, and that party is further advised that it is time to appeal or risk the loss of the right to appeal. The district court has gone as far as it can in our judicial system. The notice and advice is not affirmatively conclusive, for the appellate court must still consider whether the lower court action amounts to a judgment on a separate and distinct judicial unit, whatever may be the district court's position.

Although the appellant receives no assurance that the appellate court will agree with the district court's view that an independent claim has been settled, this is not an undue or novel hardship. First, the appellant, if in serious doubt as to statutory finality, may seek to persuade the district court to refrain from a Rule 54(b) direction and determination Second, the district court's entry of judgment under Rule 54(b) seems more likely to be accepted than repudiated as a judgment on a separate judicial unit. Third, it is not unusual, despite the inconvenience to litigants, that the action of an appeals court cannot be determined beforehand in the lower court. For example, although appeals to this Court, as distinguished from petitions for certiorari, are as of right and each appellant sets forth a basis for the statutory jurisdiction of the Court, the Court dismisses a very large number of appeals on review of the jurisdictional statement. See Stern & Gressman, *Supreme Court Practice* (2d ed. 1954), pp. 225, 233-237. Moreover, it is not uncommon for an appellant to find that an appellate court on review may dismiss an action because, notwithstanding the district court's view, it finds that fundamental federal jurisdiction was lacking *ab initio*.

We do not mean at all to suggest that the mechanism of appeals is flawless or even satisfying; but simply that

amended Rule 54(b), as interpreted by the petitioner, is geared to fit into and improve in a *limited* way the old statutory vehicle of finality. As interpreted by the respondents, new Rule 54(b) would improve the vehicle by replacing the old drivers with their juniors, who are apt to be more erratic.

E. The amended Rule affects also the jurisdiction of the Supreme Court, which has consistently rejected the view that a lower court may control the jurisdiction of an upper court.

While the case of *Mackey* v. *Sears, Roebuck and Co.*, now before the Court, directly relates to the effect of Rule 54(b) upon the courts of appeals, the direction given here by the Supreme Court will also affect its own jurisdiction and power to determine that jurisdiction. Under the Expediting Act of 1903, civil cases under the antitrust laws and the Interstate Commerce Act, where the United States brings the action, are subject to appeal "from the final judgment of the district court" to this Court. 32 Stat. 823, 15 U.S.C. Secs. 28-29 and 49 U.S.C. Secs. 44-45 (as amended). See *United States* v. *California Co-op. Canneries*, 279 U.S. 553, 73 L. Ed. 838 (1929); *Allen Calculators, Inc.* v. *Nat. Cash Reg. Co.*, 322 U.S. 137, 88 L. Ed. 1188 (1944); *National Association of Real Estate Boards* v. *United States*, 176 F. 2d 631 (D.C. Cir. 1949), reversed on other grounds, 339 U.S. 485, 94 L. Ed. 1007 (1950). An appeal may also be taken directly to the Supreme Court from the "final judgment" of the district court in actions by the federal government to enforce parts of the Federal Communications Act. 47 U.S.C. Sec. 401(d). The district courts referred to in these statutes are, of course, district courts governed by the same Federal Rules of Civil Procedure of which Rule 54(b) is a part. *Accordingly, the interpretation of the Rule urged by the respondent would result in this Court, as well as the courts of appeals, becoming irre-*

vocably bound by the direction and determination of the district court. See 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.28, p. 216.

But in numerous decisions this Court has consistently and thoroughly rejected the theory that the court from which an appeal is taken may determine the finality of the judgment on appeal. The contention has arisen upon several occasions involving appeals to the Supreme Court from the highest court of a state in which judgment could be had, under a jurisdictional statute which also requires that appeal be based on "final judgments or decrees." 28 U.S.C. Sec. 1257. While this Court will ordinarily consider the effect and incidents of a judgment under local procedure, "the designation given the judgment by state practice is not controlling." *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 72, 91 L. Ed. 80, 87 (1946). The "test is not whether under local rules of practice the judgment is denominated final • • • but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking* v. *Pink*, 317 U.S. 264, 268, 87 L. Ed. 254, 257 (1942). See also *Holcombe* v. *McKusick*, 20 How. 552, 554-555, 15 L. Ed. 1020, 1021 (1858); *Georgia Railway and Power Co.* v. *Decatur*, 262 U.S. 432, 436-437, 67 L. Ed. 1065, 1072-1073 (1923); *Market Street R. Co.* v. *Railroad Com. of Calif.*, 324 U.S. 548, 551-552, 89 L. Ed. 1171, 1176 (1945); *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 91 L. Ed. 1662 (1947). This Court's independence of the lower court's characterization of its own acts as final is strikingly illustrated by comparing the *Richfield Oil* case, *supra*, with the *Gospel Army* case, *supra*. In these cases the California courts rendered judgments in substantially the same form, having the same standing with respect to "finality" in

state practice. But, upon an examination of their actual impact under the circumstances of each case, the judgments were given differing effects for purposes of appeal.

That this Court has reserved, without diminution, the power to review questions relating to its appeals jurisdiction comes as no surprise. Such a power to review, and exercise of the power, is a necessary part of the sifting and filtering process whereby the Court follows Constitutional and Congressional directives, limits its review to important cases at a matured stage of litigation, and maintains a manageable docket. See Stern & Gressman, *Supreme Court Practice* (2d ed. 1954), pp. 10-11.

The same considerations are pertinent to the courts of appeals' authority to review decisions. Nothing in the Rules, including Rule 54(b), indicates a design to change the relationship of appellate courts to courts below, or limit what the appellate court may or may not review. As Judge Learned Hand has succinctly observed, referring to an interpretation of Rule 54(b) identical to the respondents', "Although there are of course abundant instances where appellate courts are granted a discretion as what they will review, so far as we know, this would be unique, if it conferred a power upon a lower court to determine the jurisdiction of a higher court." *Flegenheimer* v. *General Mills*, 191 F. 2d 237, 241 (2d Cir. 1951). Judge Hastie has criticized the expansive view of the respondent as a "novel conception of judicial power which enables a court of first instance in its discretion from case to case to determine whether its orders are sufficiently inclusive to be of appealable character. The conception is the more remarkable in this case because it involves authority to change the meaning of a statute at will and in the process to ignore the Supreme Court's prior construction of that statute. * * * Moreover, this sport in

judicial power would derive from a mere rule of district court procedure." Concurring opinion in *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 281 (3rd Cir. 1952).

To summarize, the language of amended Rule 54(b) is designed at most to have the district court mark the completion of its own action on one of several claims, and this is not the complete test of "finality" under the Congressional statutes for appellate jurisdiction. The 1948 amendment to the Rule did accomplish the stated purpose of its draftsmen—to eliminate the need for appeal, arising out of litigants' proper caution and uncertainty, from every decision in multiple claims cases.

In the succeeding section of this brief, the petitioner will consider the legality of the expansive interpretation recommended by the respondents. Since in no sense whatever is the respondents' interpretation compelled by the language of the Rule, a demonstration of the invalidity of that interpretation has evident relevance to the matter of correct interpretation. *Wash'n.-Southern Co.* v. *Baltimore Co.*, 263 U.S. 629, 68 L. Ed. 480 (1924). As "between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 30, 81 L. Ed. 893, 908 (1937).

II. If, under Rule 54(b), a District Court Judge's Order were "Final" and beyond Review, the Rule would Exceed the Rule-Making Power of the Supreme Court and would be Invalid as a Violation of Congressional Statutes and the Constitution of the United States.

Article III, Section 1, of the Constitution of the United States gives Congress the power to "ordain and establish" courts inferior to the Supreme Court. Under Article

I, Section 8, of the Constitution, Congress has the power "to constitute" tribunals inferior to the Supreme Court. This grant has long been construed to mean that only Congress can confer jurisdiction upon the inferior federal courts and only Congress can regulate the scope and terms of that jurisdiction. "Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon* v. *Sill,* 8 How. 441, 449, 12 L. Ed. 1147, 1151 (1850). See also *Turner* v. *Bank of North America,* 4 Dall. 8, 1 L. Ed. 718 (1799); *United States* v. *Hudson and Goodwin,* 7 Cranch 32, 3 L. Ed. 259 (1812); *Cary* v. *Curtis,* 3 How. 236, 11 L. Ed. 576 (1845); *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 67 L. Ed. 226 (1922).

On the other hand, there is little question that the Supreme Court and the lower federal courts have the inherent power to adopt rules of practice and procedure for the conduct of their affairs. But that power is severely limited. "It will not be contended that Congress can delegate to the courts, or to any other tribunals powers which are strictly and exclusively legislative". The "courts * * * may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description", but the "power given * * * is a power to vary minor regulations." *Wayman* v. *Southard,* 10 Wheat. 1, 42, 43, 45, 6 L. Ed. 253, 262, 263 (1825); see also *Bank of the United States* v. *Halstead,* 10 Wheat. 51, 6 L. Ed. 264 (1825). As Justice Brandeis has defined the permissible scope of court rules, it is "to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation, and effect of process; and the prescribing of forms, modes, and times for proceedings * * * But no

rule of court can enlarge or restrict jurisdiction." *Wash'n.-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629, 635, 68 L. Ed. 480, 483 (1924). See *Hudson* v. *Parker*, 156 U. S. 277, 284, 39 L. Ed. 424, 426, (1895); *Davidson Bros. Marble Company* v. *United States*, 213 U. S. 10, 18-19, 53 L. Ed. 675, 678 (1909); *Sibbach* v. *Wilson*, 312 U. S. 1, 85 L. Ed. 479 (1941); *United States* v. *Sherwood*, 312 U. S. 584, 589-590, 85 L. Ed. 1058, 1063 (1941).

In section 1291 of Title 28, United States Code, Congress has set forth a standard of "final decisions" for appeals. Pursuant to that statute and its predecessors and analogues, the appellate courts have always had the duty and the power to determine their own jurisdiction. See *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 28 L. Ed. 462 (1884); *Collins* v. *Miller*, 252 U. S. 364, 64 L. Ed. 616 (1920); *Republic Iron & Steel Co.* v. *Youngstown S. & T. Co.*, 272 Fed. 386 (6th Cir. 1921); *United States* v. *Curran*, 18 F. 2d 953 (2d Cir. 1927); *Raytheon Mfg. Co.* v. *Radio Corporation of America*, 76 F. 2d 943 (1st Cir. 1935), aff'd 296 U. S. 459, 80 L. Ed. 327 (1935); *AudiVision Inc.* v. *RCA Mfg. Co.*, 136 F. 2d 621 (2d Cir. 1943); *United States* v. *Tinkoff*, 153 F. 2d 106 (7th Cir. 1946), certiorari denied 329 U.S. 740, 91 L. Ed. 638 (1946); *Tomlinson* v. *Poller*, 220 F. 2d 308 (5th Cir. 1955). Regardless of the acquiescence, tacit or otherwise, of the parties, or the views of the lower court, the question of appellate jurisdiction is always "a matter for the appellate court to decide." Clark, J., in *AudiVision Inc.* v. *RCA Mfg. Co.*, 136 F. 2d 621, 623 (2d Cir. 1943).

If the restricted rule-making power of the Supreme Court and an Act of Congress are in conflict upon a matter delegated to Congress, clearly the rules must give way. Under the broad interpretation of Rule 54(b) pro-

posed by the respondents, there would be more than a conflict; Section 1291 of Title 28, United States Code, and its concomitant of appellate examination of appellate jurisdiction, would be wholly undermined. For the term of the statute "final decisions", Rule 54(b) would substitute the phrases, an "express determination that there is no just reason for delay" and an "express direction for the entry of judgment."[6] Moreover a further amendment to the statute would seem to be required to make it clear that the courts of appeals will not be entitled to review the district courts' actions, except to ascertain that the "direction" and "determination" really exist.

Under the respondents' theory, Rule 54(b) would indeed become a highly potent procedural weapon, capable of solving all appeals problems by ordering them out of existence at the behest of the trial judge. In the colorful language of Judge Frank, Rule 54(b) so construed "strikingly affects appellate jurisdiction by authorizing trial judges to play on it like an accordion." *Pabellon* v. *Grace Line*, 191 F. 2d 169, 177 (2d Cir. 1951). It is worth noting, however, that a somewhat similar interpretation of a "procedural" rule, dealing ostensibly with security for damages, fared badly at the hands of this Court. The rule in that instance had, as interpreted below, the practical effect of denying access to the courts contrary to statute. *Wash'n-Southern Co.* v. *Baltimore Co.*, 263 U.S. 629, 68 L. Ed. 480 (1924).

Rule 54(b), expansively interpreted, violates not only the jurisdictional statute itself but the Enabling Act (Act of

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[6] The sections governing direct appeals to the Supreme Court would undergo similar revision. See 15 U. S. C., Sec. 29, 49 U. S. C., Sec. 45, 47 U. S. C., Sec. 401(d).

June 19, 1934, c. 651, 48 Stat. 1064, 28 U. S. C., Sec. 2072) authorizing the Rules as well. The latter Act gives the Supreme Court power to promulgate general rules for the district courts very much in the terms used by Justice Marshall in defining the rule-making power, *i.e.*, regulating the forms of process, writs, pleadings, and motions, and practice and procedure. The Enabling Act does not authorize any enlargement or abridgment or "incidental" tampering with appellate jurisdiction. And this Court has consistently noted the limitations on the rule-making power, first in the Rules themselves and then in cases which have arisen since their promulgation. Thus, Rule 82 provides, "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts." To grant to district courts the power conclusively to determine appeals jurisdiction of the higher federal courts appears in itself to be a notable extension of the jurisdiction of the district courts. But were this not so, Rule 82 carries with it the clear implication that the Rules may not be interpreted to extend or restrict the jurisdiction of *appellate* courts. See *Flegenheimer* v. *General Mills*, 191 F. 2d 237, 241 (2d Cir. 1951). In *Sibbach* v. *Wilson*, this Court recognized its inability "to extend or restrict the jurisdiction conferred by a statute" by means of the Federal Rules. 312 U.S. 1, 10, 85 L. Ed. 479, 483 (1941); see also *United States* v. *Sherwood*, 312 U.S. 584, 589-590, 85 L. Ed. 1058, 1063 (1941). The Rules "do not affect the jurisdiction of the appellate courts to which they are not directed." *Hunteman* v. *New Orleans Public Service*, 119 F. 2d 465, 466 (5th Cir. 1941), certiorari denied 314 U. S. 647, 86 L. Ed. 519 (1941).

In view of the contradiction between the respondents' proposed interpretation with other, controlling laws and

statutes, the question naturally arises: how has that interpretation been accepted by able judges, including notable advisors on the drafting of the Federal Rules, and how has it been defended? Notwithstanding the talent employed, the arguments for the validity of the Rule are, from point to point, mutually inconsistent. They range from assertions that this rule of "procedure" only "incidentally" affects jurisdiction, to assertions that concern for jurisdictional considerations reflects a fetishistic tendency; to contentions that the interpretation is desirable to avoid appeals problems and therefore must be proper; to arguments that curbing Rule 54(b) threatens the Rules' joinder of law and equity and the whole structure of the Rules, as well as vitiating or destroying a large number of the individual rules.

The Court of Appeals below simply held that the "new rules have the effect of statutes" and "*any* laws in conflict therewith would no longer be of any force or effect" (Italics added). *Mackey* v. *Sears, Roebuck and Co.*, 218 F. 2d 295, 299, R. 40, 45 (7th Cir. 1955). This seems to disregard the constitutional and statutory limitations on the Rule's scope, as well as the pronouncements of the Supreme Court on the subject. The Court below also found that "in one sense" the jurisdiction of a court of appeals is affected by a Rule 54(b) order, but the effect is accomplished "indirectly". 218 F. 2d at 299, R. 40, 45. *Cf. Wash'n-Southern Co.* v. *Baltimore Co.*, 263 U.S. 629, 68 L. Ed. 480 (1924). Furthermore, the Court held that Rule 54(b) as interpreted by it is, like Rule 73 (a), a rule which merely shortens the time for taking an appeal. 218 F. 2d at 299, R. 46. We may well pass over this contention except to note briefly that (1) the *quantum* of time is an arbitrary matter at best, reflecting no policy whatever

as to *whether* an appeal may be taken,[7] and, more important, (2) a prescribed period of time has never been the fundamental criterion of jurisdiction, as has been the "final decisions" rule. Also, as the Notes of the Advisory Committee to Rule 73(a) make clear, Rule 73(a) has been intended as a supplement to section 1291, Title 28, United States Code, not as a replacement for it. *Cf. Hart* v. *Knox County, Tenn.*, 171 F. 2d 45 (6th Cir. 1948).

The Court of Appeals for the Third Circuit in the majority opinion in *Bendix Aviation Corp.* v. *Glass,* 195 F. 2d 267 (3rd Cir. 1952), recognized the mechanical, conclusive effect of the interpretation adopted, but found a virtue in this: "Surely a district judge is in an excellent position to determine from the standpoint of justice to the litigants the best time at which to terminate by final judgment the litigation * * * and thus open the way to immediate appellate review and execution of the judgment". 195 F. 2d 267, at pp. 271-272. The Court also explained that the phrase "final decisions" in the jurisdictional statute was not defined, and must inevitably be given content by reference to the proceedings of district courts. 195 F. 2d 267, at pp. 270-271. But the Court failed to explain why the procedural rules *necessarily* yield final judgments in the sense of the jurisdictional statute, and especially why the appellate court is to be enjoined from looking into finality in either the procedural sense, if any question should arise, or the statutory sense.

In a series of opinions, Judge Clark, representing one segment of opinion of the Court of Appeals for the

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[7] Query whether a Rule of Procedure could set two days (with elaborate filing of documents necessary), or ten years, as the time for appeal, thus either practically denying the right of appeal or suspending the operation of the laws.

Second Circuit, has expressed himself most vigorously in favor of the broad interpretation of the Rule. See *Lopinsky* v. *Hertz Drive-Ur-Self Systems*, 194 F. 2d 422, 424-430 (2d Cir. 1951); *Pabellon* v. *Grace Lines*, 191 F. 2d 169 (2d Cir. 1951); and *Rieser* v. *Baltimore & Ohio R. Co.*, — F. 2d —, 21 Fed. Rules Serv., Sec. 54b. 4, Case 5 (2d Cir. June 9, 1955). As a principal author and proponent of the Federal Rules, Judge Clark's views are entitled to respectful hearing; however we believe that they are far from convincing on this issue. Judge Clark has been concerned especially that a conclusion adverse to *his* interpretation* of Rule 54(b) might jeopardize "fully a third of the federal civil rules". See *Lopinsky* v. *Hertz Drive-Ur-Self Systems, supra*, at p. 425. The danger he foresees lies in the fact that numerous other Rules affecting appellate practice, of far-reaching effect, may be challenged. *Lopinsky* v. *Hertz Driv-Ur-Self Systems, supra*, at pp. 426-427. Without reviewing the many Rules cited in Judge Clark's opinions, his sense of menace arising out of the Rule 54(b) dispute is surely exaggerated by a consistent failure to distinguish between appellate *jurisdiction* and *practice*. As to the latter, Congress has no special Constitutional power, and in any event may be considered to have delegated considerable power to alter practice and procedure through the Enabling Act. The argument based on amalgamating all the Rules into a single unit is similar to an argument that a particular federal statute is not unconstitutional because other, related statutes are not unconstitutional. In further support of his position, Judge Clark considers

*Judge Learned Hand's interpretation of Rule 54(b), which presents no question of invalidity, is dismissed as an interpretation in extremis, to preserve the "remnants" of Judge Clark's rule. See *Lopinsky* v. *Hertz Drive-Ur-Self Systems, supra*, at p. 425, note 1.

Rule 54(b) a "good" and "beneficial" rule which allows a judge with an "overall picture" to channelize appeals. *Lopinsky* v. *Hertz Drive-Ur-Self Systems, supra,* pp. 429-430. He recommends that possible abuses of Rule 54(b) by lower courts be handled by "administrative control through court councils or directors," which would seem to offer a kind of review both novel and informal. *Lopinsky* v. *Hertz Drive-Ur-Self Systems, supra,* at p. 429.

Professor Moore, who must also be counted a proponent of the 'affirmative" interpretation of the Rule, although he anticipates many difficulties with it,* offers as a justification for his position the Supreme Court's ultimate power as arbiter of federal issues. This argument proceeds: if the Supreme Court has the power to determine what is a "final decision" in a given case, then it may do the same by a general pronouncement in exercise of its rule-making powers. 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.29, pp. 226-227. Whether or not this Court can use the Rules as a vehicle for formulating general definitions to be fitted into Congressional statutes is itself an interesting question, but beyond the scope of this case. This is not, however, the effect of the affirmative interpretation of Rule 54(b). Rather, on this construction of the Rule, the Supreme Court has abdicated both for itself and for the courts of appeals the power to review jurisdictional questions, and has allowed that power to be subordinated to the discretion of trial court judges. The interpretation, again, writes off Section 1291. Elsewhere, still in conjunction with Rule 54(b), Professor Moore deprecates the "tendency to make a fetish

*See 6 Moore, Federal Practice (2d Ed. 1953), par. 54.62, pp. 226-232.

out of jurisdiction." 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.43, p. 275. This point of view naturally assists an affirmative interpretation of Rule 54(b), but the courts can hardly abandon the concern for jurisdictional limitations set by Congress under the Constitution.

III. The Interpretation of Rule 54(b) as a Rule Fixing Appellate Jurisdiction does Violence to Orderly Appellate Procedure and Creates as Many Problems of Judicial Administration as It Resolves.[20]

The respondent's view has had considerable attraction to some judges of the courts of appeals. It appears to be mechanical and certain as far as these courts are concerned. If the trial judge uses the magical words, there is appellate jurisdiction; if he does not, there is no appellate jurisdiction. It thus relieves courts of appeals from the task of deciding the often difficult question of whether or not an order is final, and delegates the decision entirely to the district courts.

Unfortunately, delegation of authority to deal with problems does not usually eliminate the problems. Even in its negative aspects, some difficulties will be encountered under the Rule, although they appear to be manageable. For example, how shall the exceptional "offshoot" situations, involving collateral issues, be treated under the Rule, where a preliminary order may cause a substantial change of position or a decisive loss or harm to one party and yet the district court in a multiple claims case refuses to label his order "final?" See *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404 (1848); *Radio Station W.O.W., Inc. v. Johnson*, 326 U.S. 120, 89 L. Ed. 2092

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[20] We shall not again review the anomalous aspects of a rule which gives courts of first impression the power to decide matters governing the jurisdiction of courts of appeals and the Supreme Court, although it might be especially appropriate at this point.

(1945); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 93 L. Ed. 1528 (1949); *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684, 94 L. Ed. 1206 (1950). Professor Moore suggests that in these situations the order would be final despite the district court's failure to label it so. 6 Moore, *Federal Practice* (2d ed. 1953), pars. 54.31, 54.32, pp. 235-238. But *cf.* Judge Clark's opinion in *Republic of Italy* v. *DeAngelis*, 206 F. 2d 121, 132 (2d Cir. 1953).

Further, suppose a district court judge denies the right of a party to intervene under circumstances where the right to intervene is absolute, and the court fails or refuses to enter an appropriate Rule 54(b) order. Notwithstanding the absence of the magical direction or determination, Professor Moore would allow appeal from this kind of order, or would recommend use of mandamus to bring the matter to the court of appeals from the district court. See 3 Moore, *Federal Practice* (1st ed. 1952 Cum. Supp.), par. 54.02, pp. 13-14.

In other areas there remain problems of interpretation. The Court of Appeals for the Seventh Circuit holds that Rule 54(b) applies also to interlocutory orders, appealable under Section 1292 of Title 28, United States Code. Other courts disagree. See *Packard Motor Car Co.* v. *Gem Mfg. Co.*, 187 F. 2d 65 (7th Cir. 1951), certiorari dismissed 342 U.S. 802, 96 L. Ed. 607 (1951). *Contra*: *Cutting Room Appliances Corp.* v. *Empire Cutting Machine Co.*, 186 F. 2d 997 (2d Cir. 1951); *Hook* v. *Hook & Ackerman, Inc.*, 213 F. 2d 122, 128-129 (3rd Cir. 1954).

Does the amended Rule, broadly interpreted, apply to the dismissal of a claim against one of several parties? Compare *Vale* v. *Bondett*, 191 F. 2d 334 (D.C. Cir. 1951); *Boston Medical Supply Co.* v. *Lea & Febiger*, 195 F. 2d

853 (1st Cir. 1952), with *Steiner* v. *20th Century-Fox Film Corporation*, 220 F. 2d 105 (9th Cir. 1955); *Hardy* v. *Bankers Life & Cas. Co.*, 222 F. 2d 827 (7th Cir. 1955).

These issues, debatable as they may be, touch only upon the periphery of the Rule's real problems. A more critical question is whether a court of appeals may review an affirmative Rule 54(b) order to determine that the case truly involves "multiple claims", one of which is disposed of by court order? If such review is possible, what constitutes a "claim" for the measure of multiples thereof?

The courts of appeals have asserted the right to review the district court's action in order to determine whether multiple claims truly exist. See *Town of Clarksville, Va.* v. *United States*, 198 F. 2d 238, 240-241 (4th Cir. 1952), certiorari denied 344 U. S. 957, 97 L. Ed. 74 (1953); *Leonidakis* v. *International Telecoin Co.*, 208 F. 2d 934 (2d Cir. 1953); *United States Plywood Corp.* v. *Hudson Lumber Co.*, 210 F. 2d 462 (2d Cir. 1954); *Rao* v. *Port of New York Authority*, 222 F. 2d 362 (2d Cir. 1955); *cf. Gold Seal* v. *Weeks*, 209 F. 2d 802 (D. C. Cir. 1954).

The exercise of this power to review is justified on the ground that the presence of "multiple claims" is a precondition to use of Rule 54(b) (and, at least at this point, the Rule cannot be applied to confer jurisdiction on an appellate court in defiance of law). Thus, in a case where the Court of Appeals for the Second Circuit raised the jurisdictional question *sua sponte*, the Court felt "constrained" to find merely a single claim "not justifying appeal even under the amended form of the rule". *United States Plywood Corp.* v. *Hudson Lumber Co.*, *supra*, at p. 463. Here the Court found a purported counterclaim

upon analysis to be no more than an equitable defense. Notwithstanding the entry of a "final judgment" by the trial judge under Rule 54(b), the Court rejected the appeal.

It is not entirely clear, despite the reason given for review, why this aspect of a trial judge's order should be vulnerable and reviewable from the standpoint of the logic of the expansive interpretation of the Rule. The lack of an express provision barring appellate review of the trial court's "final judgment" apparently does not disturb the proponents of this interpretation. It is but a short step from that position to one whereby the trial judge's finding, either express or by implication (since he entered the magical order), of multiplicity of claims must also be conclusive. Moreover, this short step would seem to be necessary if the broad interpretation of the Rule is to have any purpose or vitality; otherwise a great number of cases on appeal may call for decisions on the issue of "multiplicity".

On close examination the problem of multiple or single claims, in some courts at least, reveals a strong resemblance to the old issue of whether—to meet one test of finality—claims arise out of same or differing transactions or occurrences. See *Reeves* v. *Beardall*, 316 U.S. 283, 86 L. Ed. 1478 (1942). Does the expansive interpretation of Rule 54(b), coupled with the power to review for multiplicity of claims, come round in a semantic circle to the same old issue at the appellate court level? If so, what purpose is accomplished by transferring disputes to a new arena?

Under the amended Rule the Court of Appeals for the Second Circuit, in deciding whether more than one claim is present in an action, would examine the relationship

of one asserted "claim" to another asserted "claim" by reference to the transaction or transactions out of which they arise. In a recent case, to illustrate, the Court found, "The facts show all the questions involved turn upon the single issue as to whether defendant delayed its shipment beyond the time permissible • • • There is thus but a single claim, based upon a single occurrence. *Reeves* v. *Beardall*, 316 U. S. 283, • • •" The Court then held that Rule 54(b) was not applicable, and ignored a district court order made under it. *Leonidakis* v. *International Telecoin Corp.*, 208 F. 2d 934, 935-936 (2d Cir. 1953).

Other courts give a different meaning to "claim" for the purpose of determining multiplicity. Thus, in the *Bendix* case, a compulsory counterclaim arose out of the same transaction involved in the principal claim. The Court of Appeals for the Third Circuit held that "the action in the district court involves multiple claims for relief" because on the one hand equitable relief and on the other, legal damages were sought. *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 269 (3rd Cir. 1952); *cf. Gold Seal* v. *Weeks*, 209 F. 2d 802 (D. C. Cir. 1954); *Interborough News Co.* v. *Curtis Publishing Co.*, 127 F. Supp. 286, 359-360 (D.C.S.D.N.Y. 1954); *Town of Clarksville, Va.* v. *United States*, 198 F. 2d 238 (4th Cir. 1952). Does "claim" mean something other than cause of action? Does it relate simply to the relief requested? Are multiple claims involved if several parties assert rights arising out of the same, or substantially the same set, of facts? The answers are not clear.

Another major problem presented by the affirmative interpretation is that of abuse of discretion by trial court judges. One advantage to the rule against piecemeal ap-

peals, from the standpoint of judicial administration, is the conservation of judicial energy at the upper court level. Another is the assurance that matters will come up on a complete and adequate record. These policies have had enough force to prevail against the convenience of either the litigants or the trial judge. Under the affirmative interpretation of the Rule, it is foreseeable that trial judges may find an appropriate order useful to facilitate *their* work and *their* dockets. Why conduct possibly two trials, or retrials, when the judicious use of Rule 54(b) at an early stage may avoid the need? On a doubtful point of law, many a trial judge will welcome the review of the higher courts. This is not to suggest that the district court judges will wilfully abuse their new-found rights. But the proponents of the broad interpretation place particular stress on the wide discretion afforded trial judges.

In many situations orders will be inherently interlocutory, although they may be certified as "final" in multiple claims cases. For example, the district court may certify a "final" order granting or denying a new trial. *Cf. Libby, McNeill & Libby* v. *Alaska Industrial Board*, 215 F. 2d 781 (9th Cir. 1954); *Kanatser* v. *Chrysler Corp.*, 195 F. 2d 104 (10th Cir. 1952), certiorari denied 344 U.S. 921, 97 L. Ed. 710 (1953). Or, to prevent what may be an unnecessary trial, the district court may allow appeal, by entering a final order, from the denial of summary judgment on one of several claims. Or the trial judge may "finalize" an order requiring the posting of security as a condition to filing an answer. See *Ace Grain Co.* v. *American Eagle Fire Insurance Co.*, 11 Fed. Rules Dec. 164, 364 (D.C.S.D.N.Y. 1951), criticized in *Pabellon* v. *Grace Line*, 191 F. 2d 169, 174, note 4 (2d Cir., 1951).

Those who would give an unreviewable power to district courts over appellate jurisdiction renounce beforehand any effective method of correcting errors. The Court of Appeals for the Third Circuit has encountered this difficulty in the recent case of *District 65* v. *McKague*, 216 F. 2d 153 (3rd Cir. 1954). The case involved an action against a clerk of court and an attorney for respectively illegally paying over and illegally retaining monies. The trial court dismissed the action as to the clerk, without making a Rule 54(b) order, and the Court of Appeals initially refused to review the dismissal because the order lacked the requisite "direction" and "determination" of Rule 54(b). The Court of Appeals observed also that "• • • it is difficult to see how on the alleged operative facts, the ends of justice would be served by the trial court treating the order appealed from as a final "decision". The appellant thereupon went back to the district court, obtained a Rule 54(b) order in good form, and returned again to the Court of Appeals on a petition for rehearing. The Court was able to reject the appeal on the highly technical ground that the district court had no jurisdiction to enter the Rule 54(b) order while the appeal was still pending.[11]

The Court also went on to state:

> "But even if jurisdiction had existed in the court below to enter the order we would deem it to have been improvidently entered. In the next to last sentence of our opinion filed August 17 we stated 'Indeed it is difficult to see how on the alleged operative facts the ends of justice would be served by the trial

[11] The appeal apparently pended although the Court of Appeals found that it clearly lacked jurisdiction under Rule 54(b)! Cf. Etten v. Kauffman, 179 F. 2d 302 (3rd Cir. 1950); Lyman v. Remington Rand, 188 F. 2d 306 (2d Cir. 1951); Roberts v. American Newspaper Guild, 188 F. 2d 650 (D.C. Cir. 1951); Vale v. Bonnett, 191 F. 2d 334 (D.C. Cir. 1951).

court treating the order appealed from as a final decision.' This was the equivalent of stating that the court below could not discreetly make 'an express determination' that there was no just reason for delay. We state for the guidance of the court below that if suits such as that at bar which present no major issue or guiding principle are to be cut up and brought piecemeal before appellate tribunals Rule 54(b) will not fulfill its function and continued disregard of the spirit of the Rule must inevitably lead to its modification or repeal."

216 F. 2d 153, at pp. 155-156,

One may, without much effort, discern in this statement by the Court a note of regret and frustration at having so completely abdicated its power to determine its own jurisdiction.[12]

Up to this point, the discussion has considered some difficulties in the operation of Rule 54(b) interpreted as the respondents would have it. The problems referred to by no means exhaust the possibilities. See 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.43, pp. 286-288. It may be worthwhile at the same time to look at some of the shortcomings of the system of appeals which Rule 54(b), however broadly construed, cannot remedy or palliate.

In numerous situations a need for trial or retrial will disappear and the action will terminate if the trial court's interlocutory orders prove to be erroneous. In other situations the parties may be put in serious jeopardy or suffer irreparable harm and loss as the result of an erroneous, but non-reviewable, order of the trial

[12] See Newburgh Moire Company v. Superior Moire Company, 218 F. 2d 580, 583 (3rd Cir. 1955) where the same Court also took the precaution of stating the conditions for a possible future Rule 54(b) order.

judge. These unfortunate consequences are possible due to the lack of appeal in the following situations:

(1) Denial of a motion to dismiss, where the motion is based upon a legal defense such as a statute of limitations or lack of jurisdiction. See *E. I. Dupont de Nemours Company, Inc.* v. *Hall*, 220 F. 2d 514 (4th Cir. 1955); *Austrian* v. *Williams*, 198 F. 2d 697 (2d Cir. 1952), affirmed, 331 U. S. 642, 91 L. Ed. 1718 (1947); *Hydraulic Press Mfg. Co.* v. *Moore*, 185 F. 2d 800 (8th Cir. 1950).

(2) Denial of a motion for summary judgment. See *Drittel* v. *Friedman*, 154 F. 2d 653 (2d Cir. 1946); *Dutton* v. *Cities Service Defense Corp.*, 197 F. 2d 458 (8th Cir. 1952); *Hook* v. *Hook & Ackerman, Inc.*, 213 F. 2d 122 (3rd Cir. 1954).

(3) Grant of a motion for a new trial. See *Kanatser* v. *Chrysler Corp.*, 195 F. 2d 104 (10th Cir. 1952), certiorari denied, 344 U. S. 921, 97 L. Ed. 710 (1953); *Long* v. *Davis*, 169 F. 2d 982 (9th Cir. 1948); *United States* v. *Hayes*, 172 F. 2d 677 (5th Cir. 1949); *Ford Motor Co.* v. *Busam Motor Sales*, 185 F. 2d 531 (6th Cir. 1950).

(4) Denial of a motion to quash a subpoena *duces tecum* or to limit discovery. See *Cobbledick* v. *United States*, 309 U. S. 323, 84 L. Ed. 783 (1940), affirming *Palmuth* v. *United States*, 107 F. 2d 975 (9th Cir. 1939); *O'Malley* v. *Chrysler Corporation*, 160 F. 2d 35 (7th Cir. 1947); *Dille* v. *Carter Oil Co.*, 174 F. 2d 318 (10th Cir. 1949), certiorari denied, 338 U. S. 850, 94 L. Ed. 520 (1949).

The statutory rule of finality thus may work unjustifiable hardship, even if for the generality of cases the rule is desirable and necessary. Rule 54(b) cannot cope with these troublesome situations. As Judge Frank has pointed out, "At most, the Rule can be no more than a tiny

island in a large sea of troubles for litigants." Concurring opinion in *Rieser* v. *Baltimore & Ohio R. Co.*, — F. 2d —, 21 Fed. Rules Serv. 54b.4, Case 5 (2d Cir. June 9, 1955).

IV. The Solution to Difficult Problems of Appellate Jurisdiction Requires Statutory Action Rather Than Tinkering with the Federal Rules.

The overall difficulties with appellate jurisdiction are two-fold, and both stem from the statutory requirement of final decisions as a basis for jurisdiction. First, the term "final decisions" has no inherent precision and requires case-by-case delimitation. Second, where admittedly no final decision has been rendered, appellate review may still be desirable.

The first difficulty does not yield readily to any gadget, and certainly is not solved by delegation of the power to decide finality. As the views of the courts on the meaning of "final decisions" in multi-claims cases become more settled, rules to guide parties and judges may be expected to develop. In its negative aspect, Rule 54(b) eliminates the worst effect—uncertainty—of the finality test, since it gives the parties the notice needed to prevent a foreclosure of appeal.

The second difficulty may be met by providing discretion in the *courts of appeals* to review interlocutory orders. This will necessarily require a change in the jurisdictional statute. See *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 181, 99 L. Ed. 171, 175 (1955).

Proposals for greater flexibility and references to the need for statutory change have been made in many quarters, and by some of those most familiar with the problems, including members of this Court, members of Courts

of Appeals such as Judges Learned Hand and Frank, and legal scholars. See *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, 263-264, 93 L. Ed. 1347, 1353 (1949); *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 516-517, 94 L. Ed. 299, 305 (1950); *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176, 181, 99 L. Ed. 171, 175 (1955); *AudiVision Inc.* v. *RCA Mfg. Co.*, 136 F. 2d 621, 625-628 (2d Cir. 1943); *Zalkind* v. *Scheinman*, 139 F. 2d 895, 898, note 3b (2d Cir. 1943); *Clark* v. *Taylor*, 163 F. 2d 940, 951-952, note 12 (2d Cir. 1947); *American Machine & Metals* v. *De Bothezat*, 173 F. 2d 890 (2d Cir. 1949); *Pabellon* v. *Grace Line*, 191 F. 2d 169, 179 (2d Cir. 1951); 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.43, pp. 288-292; Crick, "The Final Judgment Rule", 41 Yale L. Journ. 539, 564-565 (1932); Moore & Vestal, "Federal Appellate Procedure", 35 Va. L. Rev. 1, 45 (1949); Note, "Federal Rule 54(b) and the Final Judgment Rule", 28 N. Y. U. L. Rev. 203 (1953).

Several drafts of possible legislation have been formulated. These vary from giving the district court a power to certify, with or without discretion on the part of the court of appeals to accept, to a form of certiorari jurisdiction of courts of appeal akin to that of this Court. For example, one proposal contemplates a new "Section 1292A" in Title 28 of the United States Code, which would give the courts of appeals power to review interlocutory orders at their discretion in specified situations. Note, "Federal Rule 54(b) and the Final Judgment Rule", 28 N. Y. U. L. Rev. 203 (1953).

In September, 1953 the Judicial Conference of the United States reported a draft statute as follows:

> "Section 1292 of Title 28 of the United States Code is hereby amended by insertion of the letter (a) at the beginning of the section and adding at the

end thereof an additional sub-paragraph lettered (b) to read as follows:

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States, September 24-25, 1953, Washington, D. C., at p. 27; see discussion of this proposed statute in *Rieser* v. *Baltimore Ohio R. Co.*, — F. 2d —., 21 Fed. Rules Serv. 54b.4, Case 5 (2d Cir. June 9, 1955); 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.43, pp. 290-292. Although this draft statute has been criticized with respect to the role of the district courts and the scope of discretion, it has been overall favorably regarded by those concerned with the problems of appeals jurisdiction.[13] The proposal of the Judicial Con-

[13] In fact, it has been suggested in several quarters in the past few years that the Judicial Conference is particularly qualified to deal with the appeals problem. See, e.g., Professor Herbert Wechsler's comment: "The problems of the circuit courts pose narrow issues, of which the final judgment rule suggests a prime example; changes in this area are rightly left to the initiative of the Judicial Conference, well-equipped to see the situation as a whole." Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 Law & Contemp. Probs. 216, 219 (1948); see also 6 Moore, Federal Practice (2d ed. 1953), par. 54.43, p. 291.

ference has been transmitted to the Committees on the Judiciary of the Senate and the House. 100 Cong. Rec. 1079, 1168 (1954).

If this Court should, however, adopt an interpretation of Rule 54(b) which gives discretion to trial judges, and which, in the view of some, cures the grievous ills of appellate jurisdiction, the impetus for a thoroughly considered change in the law of appellate jurisdiction may well be weakened accordingly. As the French aphorism observes, "Petty reforms are the enemies of major reforms".

This Court has noted only recently the practical conditions for statutory reform in this specific area. Referring to past legislative modifications of the finality rule, the Court declared, "the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." The Court continued:

> "When the pressure rises to a point that influences Congress, legislative remedies are enacted. The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction."

Reed, J., in *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 181, 99 L. Ed. 171, 175 (1955). The Court ended by reminding that it is "not authorized to approve or declare judicial modification. It is the responsibility of *all* courts to see that no unauthorized extension or reduction of jurisdiction, *direct or indirect*, occurs in the federal system." (Italics added). *Id.* at p. 181, (L. Ed., p. 175).

The substantial problems involved in a reform of appellate jurisdiction are problems for Congress. Proposed statutory measures are presently receiving consideration by some of the ablest members of the bench and bar. On the other hand, the problems are not and cannot be resolved by a strained interpretation of Rule 54(b).

CONCLUSION.

As the language and history of the amendment to Rule 54(b) emphasize, the Rule serves the purpose of definitely establishing when an order or decision is *not* final. But the forms prescribed by it cannot confer finality upon a decision which does not meet the standards of a "final decision" required by Congressional statutes as interpreted by the appellate courts. The appellate courts should remain the masters of their own jurisdiction under the law.

Therefore, the Court of Appeals below has erred in its self-denial. The decision of the Court of Appeals denying the motion to dismiss the appeal should be reversed, and the cause should be remanded for further hearing in that Court on the question whether the appeal meets the statutory test for appellate jurisdiction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 34

SEARS, ROEBUCK AND CO., a New York corporation,
Petitioner,

v.

BRUCE A. MACKEY, individually, and TIME SAVER TOOLS, INC., an Illinois corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT.

The issue before the Court is properly and solely that of the interpretation and effect to be given to Rule 54(b) as amended.

For reasons not too difficult to discern, the respondents in their brief have raised many more issues than did either the petition for writ of certiorari or the petitioner's brief.[1]

[1] Compare the "Questions Presented" in the respondents' brief with the "Questions Presented" in the petition for writ of certiorari, on the basis of which the writ was granted.

They attempt to relegate the issue upon which certiorari was granted to a secondary position and, in so doing, demonstrate both a lack of confidence in the opinion and reasoning of the Court of Appeals below and a disregard for the rules of the Supreme Court with respect to certiorari review. The respondents have also found it necessary or desirable to advance at least one theory and argument not otherwise to be found in the record of the case.

Thus, the respondents contend that apart from amended Rule 54(b) an appeal would lie from the District Court to the Court of Appeals under two Congressional enactments (28 U. S. C. Sections 1291, 1292), and under *former* Rule 54(b). These contentions (except as to Section 1292) were presented, briefed, and argued at considerable length before the Court of Appeals, which plainly refused to pass on them.

> "In view of our decision it is not necessary to decide the point much discussed in the briefs as to whether the order and judgment entered herein would have been final and appealable prior to the 1948 Amendment of Rule 54(b)." *Mackey* v. *Sears, Roebuck and Co.*, 218 F.2d 295, at p. 299; R. 40, at p. 46.

Apparently taking the view that one United States court is much like another,[1] the respondents would have the Supreme Court now settle a question upon which the Court of Appeals deliberately withheld decision. However, this Court does not often act as a substitute or replacement for the courts of appeals; rather, in a case arising on certiorari, the Court exercises a selective power to review

[1] This view also appears in the argument on amended Rule 54(b), where the respondents urge that the district courts are the appropriate courts for deciding the finality of orders, i.e., for deciding the jurisdiction of the courts of appeals.

the determinations of the lower courts. If the Court of Appeals below does not reach a question, the Supreme Court has "no occasion to decide" it. *Owens* v. *Union Pacific Railroad Company*, 319 U. S. 715, 724-725, 87 L. Ed. 1683, 1689 (1943); *Calmar Steamship Corp.* v. *United States*, 345 U. S. 446, 456, 97 L. Ed. 1140, 1147 (1953).

The respondents' invitation to the Court to assume the tasks of the Court of Appeals is made in apparent disregard of Rule 23 (1) (c) of the Rules of the Supreme Court, as amended effective July 1, 1954, which provides that the statement of a question presented in a petition for certiorari "will be deemed to include every subsidiary question fairly comprised therein". "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." The issue of the statutory finality of an appeal to a court of appeals is hardly "subsidiary" to, or "comprised" within, questions relating to the proper interpretation of Federal Rule 54(b),[3] that is, the questions presented in the petition. To the contrary, as both briefs here and the arguments and opinion below make clear, statutory finality is a separate legal question.

Considerations of judicial policy also make it desirable to confine the issues to the questions relating to Rule 54(b) presented in the petition. The Rule 54(b) controversy is the only matter upon which the Court below suggested that this Court grant certiorari. See *Mackey* v. *Sears, Roebuck and Co.*, 218 F. 2d 295, at p. 298; R. 40, at p. 44. Furthermore, it is the Rule 54(b) issue which gives rise to conflict in the views of the various courts of ap-

[3] Thus, the proponents of the affirmative interpretation of amended Rule 54(b) frequently argue that the Rule is intended to avoid questions of statutory finality. Cf. Resp. Br., pp. 28-30.

peals and individual judges thereof; and it is the Rule 54(b) dispute which requires clear resolution. On the other hand, issues of finality under the jurisdictional statute, while sometimes difficult, are neither novel nor the subjects of inter-court controversy. As Mr. Chief Justice Taft once observed, in a case where a court of appeals had wrongfully refused to provide equitable review, "On this review by certiorari, we could consider and decide the issue which the Circuit Court of Appeals erroneously refused to consider. On such an issue alone, however, we would not have granted the writ, because, except for the important question of practice, the case was not of sufficient public interest to justify it. We think it better, therefore, to reverse the judgment of the Circuit Court of Appeals, and to remand the case to that court. . . ." *Liberty Oil Company* v. *Condon National Bank,* 260 U. S. 236, 245, 67 L. Ed. 232, 237 (1922). See also *Rosenthal* v. *New York Life Insurance Company,* 304 U. S. 263, 82 L. Ed. 1330 (1938); *Cities Service Oil Company* v. *Dunlap,* 308 U. S. 208, 84 L. Ed. 196 (1939).

In the search for a basis for appellate jurisdiction more persuasive than that accepted by the Court below, the respondents have also recklessly seized upon Section 1292(1) of Title 28 of the United States Code, which allows appeals from interlocutory orders granting or denying injunctions. The record is wholly devoid of any motion or request for an interlocutory injunction, or any interlocutory order with respect to a motion or request for injunction, or any notice of appeal from such an interlocutory order upon an injunction. The only injunction sought was a *permanent* injunction, as an ancillary part of the ultimate relief requested in Count I, if and when the respondents' claims were decided upon favorably. Furthermore, this theory of appellate jurisdic-

tion was neither disclosed in the Court of Appeals nor did it appear in the respondents' brief in opposition to the petition to this Court. The theory appears for the first time, as a frivolous afterthought, in the final argument to this Court. Under these circumstances the argument is certainly "not open." *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391, 92 L. Ed. 17, 20 (1947); see also *Kay* v. *United States*, 303 U. S. 1, 4-5, 82 L. Ed. 607, 610-611 (1938); *Duignan* v. *United States*, 274 U. S. 195, 200, 71 L. Ed. 996, 1000 (1927).

The sole issue upon this review remains the issue of how to construe Rule 54(b) as amended; that is, the issue determined by the Court of Appeals and presented in the petition for writ of certiorari. Upon the Rule 54(b) issue the respondents' novel contribution is the repeated observation, contradicting the court below, that there is no longer a conflict in the circuits.[4] See Resp. Br. pp. 7, 9, 11, 24, 25, 37. But cf. *Mackey* v. *Sears, Roebuck and Co.*, 218 F. 2d 295, 297-298; R. 40, 42-44. Sometimes further exaggerating the support for their position, the respondents argue that not only all courts but all persons agree that an affirmative purpose is intended to be accomplished by Rule 54(b), "except for petitioner, (and) only Flegenheimer, now expressly overruled." Resp. Br., p. 11.

For its part, the petitioner has nowhere suggested that all or most courts agree with its view. Indeed a show of

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[4] The respondents at times modify the extreme statement by admitting that at least one of the courts of appeals remains recalcitrant. At the top of page 9 of the respondents' brief it appears that "all" courts agree with the respondents' view of Rule 54(b), but below on the same page, the District of Columbia Court of Appeals does not agree. For the purposes of this argument, therefore, "all" means something less than each and every.

hands in the courts of appeals, for what such a count is worth, would give a preponderance to the respondents' position. However, it is something less than candid to argue that "except for petitioner" no one can resist the affirmative interpretation of Rule 54(b), and to cite the *Rieser* case[5] for this statement. In that case, strangely enough in the face of respondents' argument, an unreconstructed Judge Frank wrote an elaborate opinion fully supporting the petitioner's position and restating his agreement with the reasoning of the *Flegenheimer* case.[6] Moreover, both opinions in the *Reiser* case, opposed to each other on Rule 54(b), were essentially *obiter dicta*, in the nature of advisory opinions to the Supreme Court in the pending case of *Sears, Roebuck and Co.* v. *Mackey*, as Judge Clark made clear. See *Rieser* v. *Baltimore and Ohio Railroad Company*, 224 F. 2d 198, at p. 200. And the opinion of Judge Clark, certainly favorable to the respondents' view, simply reiterated and added little to arguments he had already set forth at length in the *Pabellon* and *Lopinsky* cases. See *Pabellon* v. *Grace Line*, 191 F. 2d 169; *Lopinsky* v. *Hertz Drive-Ur-Self Systems*, 194 F. 2d 422. Thus, the *Rieser* case scarcely involves an about-face in the second circuit, as the respondents so stridently assert.[7]

Apart from the situation in the second circuit, the Court of Appeals for the District of Columbia has consistently, and does currently, follow the views of Judges Learned Hand, Frank, and Hastie. See *Gold Seal Co.* v.

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[5] **Rieser v. Baltimore and Ohio Railroad Company, 224 F. 2d 198.**

[6] **Flegenheimer v. General Mills, Inc., 191 F. 2d 237.**

[7] **The court of appeals for the second circuit, as is well-known, does not sit en banc to reconcile intra-court conflicts; thus, two panels of the court may reach opposite results in different cases.**

Weeks, 209 F. 2d 802, 810-811; *Capital Transit Co. v. District of Columbia*, —— F. 2d ——, 21 Fed. Rules Serv. 54 b. 4, Case 7; cf. *Creel* v. *Creel*, 184 F. 2d 449, 452. Moreover, there has been a sharp division of views in the third circuit. *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 277.

When, therefore, the respondents assert that only the petitioner fails to walk in the new sunlight of Rule 54(b), they unkindly and unflatteringly ignore a good-sized company of judges of the courts of appeals. The respondents' dismissal of these judges is wholly unnecessary, since the Rule 54(b) issue is not likely to be decided in this Court by counting or, more accurately, throwing out "votes" below.

Elsewhere, the respondents argue that some kind of review of Rule 54(b) orders may occur even under the affirmative view of the Rule.[8] The exact nature of such

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[8] See Resp. Br. pp. 38-39. To illustrate the point, the respondents have erroneously cited, among other cases, the **Gold Seal** and **District 65** cases. In the **Gold Seal** case, the Court clearly **repudiated** the affirmative view of Rule 54(b), and the case can hardly provide an illustration of review under that interpretation. "The fact that the motions judge, in the order sought to be reviewed, characterized the same as a final judgment upon a separate claim cannot make the order such a judgment or the claim such a claim, if the claim fails to meet the standard of separateness or distinctness required by the law and the judgment fails to meet the standards of finality so required. . . . With due deference to our colleagues in the United States Court of Appeals for the Third Circuit we feel obliged to follow the position taken in the cases decided in the Second Circuit." **Gold Seal Co. v. Weeks**, 209 F. 2d 802, 810-811. In the **District 65** case the Court observed that abuse of Rule 54(b) would inevitably lead to the modification or repeal of the Rule. This statement is not the equivalent of reviewing a Rule 54(b) order. The decision in the **District 65** case was made on altogether different grounds than the respondents represent. See **District 65, Etc. v. McKague**, 216 F. 2d 153; Pet. Br., pp. 43-44 (summary).

review is left undefined. But while it is true, as the petitioner pointed out in its original brief,[9] that some courts will review Rule 54(b) orders for a determination whether "multiple claims" exist, this kind of review is a very long way from review for the statutory finality required of an appealable order or decision. Especially does this form of review fall short if any "claim" may be disposed of "finally" under Rule 54(b) "without regard to the relationship of the particular claim to the other claims," as the respondents state on page 34 of their brief. It is a basic characteristic of a final decision in the statutory sense that it disposes of a separate and independent claim.[10]

Finally, following the argument of some courts, the respondents declare that amended Rule 54(b) is "procedural" because it affects only the "timing" of appeals. Resp. Br., pp. 34-35, 37. This is a play on words. In a sense, the statutory test of finality is itself only a test of "timing", the "time" for appeal being fixed by the lower court's final action. Does this mean that the jurisdictional statute is also only a matter of "procedure"?

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[9] Pet. Br., pp. 39-41.

[10] See **Reeves v. Beardall**, 316 U.S. 283, 86 L. Ed. 1478 (1942). In their discussion of this case, the respondents have attached little significance to the Supreme Court's observation that, to be final, an order disposing of one claim of "multiple claims" must dispose of a separate and distinct transaction or occurrence.

CONCLUSION

The proper issue before this Court remains the issue whether Rule 54(b) should and can be construed to empower the district courts to determine the jurisdiction of the courts of appeals irrespective of Section 1291 of the Judiciary Title. In their argument, respondents have omitted to explain, among other things, how the jurisdictional statute can be replaced by a rule of district court procedure.

Respectfully submitted,

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HERBERT E. RUBEN,
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IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. 34

SEARS, ROEBUCK & CO.,
Petitioner,

vs.

BRUCE A. MACKEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

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OCTOBER TERM 1954

No. 617

SEARS, ROEBUCK & CO.,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The opinions of the District Court (R. 22-25; 35-36), and the opinion of the Court of Appeals denying petitioner's motion to dismiss the appeal (Pet. App. A, 2a-9a), are not reported. No opinion has been rendered by the Court of Appeals on the merits of respondent's appeal.

Jurisdiction.

No judgment or decree has been entered by the Court of Appeals. Petitioner invokes this Court's power to review cases in the courts of appeals "before or after judgment or decree". 28 U.S.C. §1254(1).

Rule Involved.

Rule 20 of the Revised Rules of the Supreme Court of the United States reads as follows:

"Certiorari To A Court Of Appeals Before Judgment.

"A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U.S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110; *Carter* v. *Carter Coal Co.*, 298 U.S. 238; *Ex parte Quirin*, 317 U.S. 1; *United States* v. *United Mine Workers*, 330 U.S. 258; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579."

Questions Presented.

1. Whether petitioner has made the showing of imperative public importance required by Rule 20 of the Rules of this Court.

2. Whether an order dismissing a claim for relief under the antitrust laws based on events "A", "B" and "C" in combination, and also a claim for relief under the common law based on event "A", is appealable notwithstanding the fact that claims for relief based respectively on events "B" and "C" were not dismissed.

Statement.

The complaint filed by respondent (hereinafter sometimes referred to as "plaintiff"), originally contained six

counts, but only four counts are now material.[1] (R. 3) In Count I plaintiff alleges a continuing violation of the antitrust laws by petitioner (hereinafter sometimes referred to as "Sears"), consisting of a predatory program of destruction aimed at all of plaintiff's business activities. Counts II, III and IV are common law counts, each involving a separate event and a separate business. Count II alleges that Sears intentionally destroyed plaintiff's lamp business (Metalcraft) by means of localized price-cutting; Count III alleges that Sears induced a breach of plaintiff's commission arrangement with a tool supplier (Vascoloy) by means of a threatened secondary boycott; Count IV alleges unfair competition with plaintiff's tool business (Time Saver).

The District Court ordered Counts I and II stricken without leave to amend, found that there was no just reason for delaying the final determination of the issues raised by these counts, and expressly directed that judgment be entered against plaintiff on said counts. (R. 36-38). Thus, final judgment was entered on the claim for relief under the antitrust laws, based on all of the events in combination, and also on the claim for relief under the common law based on the intentional destruction of plaintiff's lamp business. The portions of the complaint which remain, and are now pending for trial, are not based on the antitrust laws and contain no allegations pertaining to plaintiff's lamp business.

Petitioner submitted to the District Court a draft order and judgment containing the findings required by Rule

[1] Count V, which was based on Section 2(f) of the Robinson-Patman Act was abandoned after the decision of this Court in **Automatic Canteen Co. v. Federal Trade Commission**, 346 U.S. 61 (R. 22). All of the allegations of Count VI were stricken, except insofar as that count realleged the allegations contained in Count III. (R. 37).

ARGUMENT.

1. Petitioner has not complied with Rule 20 of the Rules of this Court.

The application for certiorari is made before judgment in the Court of Appeals. Accordingly, under Rule 20 of the Rules of this Court, petitioner must make a showing that this case is of such imperative public importance as to require immediate settlement by this Court.[1] Petitioner has not even attempted to comply with this Rule. And, in fact, the necessary showing could not conceivably be made.

In urging the Court to depart from its normal procedure, petitioner cites no cases in which certiorari was granted before the termination of proceedings in the Court of Appeals.[2] Petitioner merely argues that if the Court does not grant certiorari at this time, it will never have an opportunity to pass on the question sought to be presented. This is not so, as is demonstrated by the many cases in which this Court has decided comparable jurisdictional issues after the termination of proceedings in the Court of Appeals. See *e.g., Reeves* v. *Beardall*, 316 U.S. 283 (1942). The question raised by this petition can be presented to this Court in this very case after the Court of Appeals has determined the merits of the appeal

[1] The showing required is one which might well lead the Court to convene a Special Term if necessary. The Court did so in **Ex parte Quirin**, 317 U.S. 1, and, if it had not been sitting, probably would have done so in the most recent cases cited in Rule 20. **United States v. United Mine Workers**, 330 U.S. 258; **Youngstown Co. v. Sawyer**, 343 U.S. 579.

[2] In all of the cases cited by petitioner (Pet. 9), judgment had been given by the Court of Appeals. The orders involved were interlocutory only in the sense that further proceedings in the trial court were contemplated.

pending before it. If the District Court's order is affirmed, plaintiff can apply for certiorari; if it is reversed, Sears can do so.[1] Upon such an application even if the jurisdictional question is not raised by the litigants, this Court will consider it of its own motion.

Even if the Rule 54(b) question would not otherwise come before this Court in this case, this is not a reason for granting certiorari at this time. Surely, if the question is as important as petitioner claims, it will reach the Court in other cases. In any event, it is not of "imperative public importance" to have Rule 54(b) construed in this case instead of another.

2. The Question of the Effect of the 1948 Amendment to Rule 54(b) is not Presented by the Record.

The District Court's order would have been appealable prior to the amendment to Rule 54(b), and it is uniformly held that orders which would have been appealable prior to the 1948 amendment are now appealable if the requisite findings are made. The order and judgment of the District Court is such an order.

All allegations with respect to plaintiff's lamp business were stricken, as were all antitrust allegations. Only Count III which alleges inducing breach of contract and Count IV which alleges unfair competition with plaintiff's tool business, were left for trial. Accordingly, the order dismissing Counts I and II would have been appealable prior to the 1948 amendment. *Reeves* v. *Beardall*, 316 U.S. 283 (1942); *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83 (C.A. 2d 1939). Since the finding required by amended Rule 54(b) was made, the order is appealable

[1] The fact that Sears as a matter of tactics may not choose to apply for certiorari at that time (Pet. 10) is certainly not a reason for this Court to grant certiorari now.

whatever construction is given to the 1948 amendment to the Rule.

This Court's consideration of the effect of the 1948 amendment to Rule 54(b) should await an appeal from the dismissal of an order which would not have been appealable prior to the amendment.

3. The Decision of the Court of Appeals is Clearly Correct.

For the reasons stated by the Court of Appeals, it is clear that its interpretation of the 1948 amendment to Rule 54(b) properly reflects the intention of its draftsmen. There can be no more question of this Court's power to promulgate the amendment, than there was about the validity of original Rule 54(b) which was upheld in *Reeves* v. *Beardall*, 316 U.S. 283 (1942).

CONCLUSION.

The orderly progress of this litigation should not be delayed by the issuance of a writ of certiorari at this stage of the proceedings. Since the time in which Sears may file its brief on the merits in the Court of Appeals has been extended until after this Court acts on the petition for certiorari, respondent prays that the petition be promptly denied.

Respectfully submitted,

EDWARD I. ROTHSCHILD
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54(b), as amended in 1948. That order was entered, and respondent appealed. After the record had been printed and filed, and after respondent had filed his printed brief, petitioner moved to dismiss the appeal on the ground that the order of the District Court lacked finality. The Court of Appeals denied the motion, and now petitioner seeks certiorari in advance of any ruling by the Court of Appeals on the merits of respondent's appeal.

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT.

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OPINIONS BELOW.

The opinion of the Court of Appeals is reprinted at pages 40-46 of the Record and is reported at 218 F.2d 295. The memoranda of the District Court are reprinted at pages 20-34 of the Record. The District Court's order and judgment are reprinted at pages 34-36 of the Record.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code. 28 U.S.C. § 1254(1), 62 Stat. 928.

STATUTES AND RULES INVOLVED

Section 1291 of the Judicial Code (28 U.S.C. § 1291, 62 Stat. 929):

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

Section 1292 of the Judicial Code (28 U.S.C. § 1292, 62 Stat. 929):

> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions."

Original Rule 54(b) of the Federal Rules of Civil Procedure (28 U.S.C., following § 723(c)):

> "Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

Amended Rule 54(b) of the Federal Rules of Civil Procedure (28 U.S.C.A.):

> "Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action,

whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

QUESTION PRESENTED.

1. Whether the Court of Appeals erred in denying petitioner's motion to dismiss respondent's appeal?

   (a) Would the judgment of the District Court have been final and appealable under Section 1291 of the Judicial Code prior to the amendment to Rule 54(b) of the Federal Rules of Civil Procedure, and is it therefore final and appealable under the amended Rule, the requisite determination and direction having been made by the District Court?

   (b) Is the judgment of the District Court final and appealable under Section 1291 by virtue of amended Rule 54(b) of the Federal Rules of Civil Procedure; whether or not final and appealable prior to the amendment to that Rule?

   (c) If not appealable under Section 1291, is the judgment of the District Court denying an injunction appealable under Section 1292(1).

STATEMENT OF THE CASE.

The complaint, in six counts, was filed by Bruce A. Mackey, respondent here, and Time Saver Tools, Inc., a corporation wholly owned by Mackey. Sears, Roebuck & Co., the petitioner, is the only defendant.

The complaint alleges that between 1949 and 1952, Sears deliberately destroyed three separate businesses successively engaged in by Mackey, pursuant to Sears' predatory purpose to discipline its suppliers and to monopolize trade and commerce in violation of the antitrust laws.

In 1949, Sears deliberately set out to destroy and did destroy Mackey's lamp business by means of localized price-cutting. (Count II—R. 8.) In 1952, by means of a threatened secondary boycott, Sears induced a third party, Vascoloy, to breach its contract with Mackey under which Mackey received commissions on certain sales by Vascoloy. (Count III—R. 9.) Also in 1952, Sears violated Time Saver's patent rights and was guilty of unfair competition with Time Saver's tool business, in an attempt to destroy this business. (Counts IV and V—R. 9-10.) The successive predatory acts were carried on pursuant to a deliberate and announced plan of Sears to destroy Mackey's business activity, and for the purpose of disciplining Sears' suppliers and monopolizing trade and commerce. On the basis of such conduct, Mackey claimed treble damages and equitable relief under the antitrust laws (Count I—R. 2-8) and damages under the common law. (Count VI—R. 10-11.)

In summary, the complaint was as follows:

Count I:

Mackey's claim for treble damages and an injunction under the antitrust laws.

Count II:

Mackey's claim for the wilful destruction of his lamp business.

Count III:

Mackey's claim for inducing breach of his commissions contract with Vascoloy.

Count IV:

Time Saver's patent and unfair competition claims.

Count V:

Time Saver's claim under Section 2(f) of the Robinson-Patman Act, which was abandoned after this Court's decision in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953). R. 20.

Count VI:

Mackey's claim under the common law for damages resulting from Sears' continuing predatory program.

Petitioner answered Count III and filed a motion to dismiss the other counts. R. 17-20. This motion was granted as to all counts, except Count VI to the extent that it duplicates Count III. R. 35. With respect to Counts I and II, the District Court denied leave to amend, and in accordance with amended Rule 54(b), made an express determination of no just reason for delay and entered judgment dismissing these counts. R. 35-36. Count IV was dismissed with leave to amend (R. 35); amended Count IV is at issue.

Thus, all of Mackey's claims, except his claim for inducing breach of contract, have been dismissed; his claims based upon his lamp business and his claims based upon Sears' continuing predatory conduct are out of the case. There remain for trial only Mackey's claim based on his

Vascoloy contract and Time Saver's claim with respect to its tool business.

The judgment entered by the District Court was in the form submitted by petitioner. All parties considered it final and appealable.[1] Mackey appealed (R. 36), and after the printed record and Mackey's brief were filed in the Court of Appeals, Sears moved to dismiss the appeal on the ground that the order of the District Court was not final. R. 39. This motion was denied by the Court of Appeals. R. 47. Sears' petition for *certiorari* was granted. 348 U.S. 970 (1955). The determination of Mackey's appeal on the merits is being held in abeyance in the Court of Appeals.

The question before this Court is whether the Court of Appeals erred in denying the motion to dismiss the appeal, or, stated another way, whether the judgment of the District Court was appealable. This Court is not confined, as petitioner suggests, to a determination of whether the Court of Appeals based its decision on the right ground.

SUMMARY OF ARGUMENT.

The sole question presented by this case is whether the Court of Appeals correctly denied petitioner's motion to dismiss respondent's appeal.

The District Court's judgment would have been appealable under original Rule 54(b) and is therefore appealable under the amended Rule, the requisite findings having been made by the District Court. And even if not appealable under the original Rule, the judgment is appeal-

[1] Petitioner's "Memorandum of Law in Support of Defendant's Motion to Dismiss the Appeal", filed in the Court of Appeals (at p. 8): "Attorneys for defendant approved the order, understanding that a final appealable order was being entered pursuant to Rule 54(b)."

able under Section 1292(1) because of the refusal to grant an injunction. Accordingly, it is not necessary to the decision in this case to consider the effect of amended Rule 54(b).

The Court may nevertheless wish to consider the question of the appealability of the judgment solely on the basis of the amendment to Rule 54(b). It may wish to do so even though the conflict previously existing in the Circuits, if conflict there was, has been eliminated by the decision of the Second Circuit in *Rieser* v. *Baltimore & Ohio Railroad Co.*, 224 F.2d 198 (C.A. 2d 1955), decided after the grant of *certiorari* in this case. But even if the Court considers the appealability of the judgment solely on the basis of the amended Rule, the sole question then presented is whether the District Court correctly applied the amended Rule to this case. There is not presented, as petitioner suggests in its "Questions Presented" (Petitioner's Brief, p. 2), the abstract question whether the district courts can "automatically and conclusively" determine appellate jurisdiction. Just as it ignores the grounds for affirmance other than the amended Rule, petitioner ignores the real question with respect to the amended Rule, to-wit: In this specific case, is the judgment of the District Court, entered in accordance with the amended Rule, final and appealable?

Nowhere in petitioner's brief is there a suggestion that multiple claims for relief are not involved. Nowhere is there a suggestion that the District Court erred in finding that there was no just reason for delay. Nowhere is there a suggestion that the District Court did not comply with the provisions of the amended Rule for the entry of final judgment. In fact, petitioner's brief hardly discusses what is a final judgment, but pleadingly asserts and reasserts the abstract proposition that district courts cannot "auto-

matically and conclusively" determine appellate jurisdiction.

Rule 54(b) findings are not automatic and conclusive. They are reviewable by the appellate courts and they have been reviewed and appeals have been dismissed notwithstanding such findings. The district courts do not determine appellate jurisdiction under the amended Rule or under any other rule regulating proceedings in the district courts, however much such rules affect appealability. Jurisdiction is conferred by statute. The straw man set up by petitioner thus has no place in the case.

The first essential to the consideration of the application of the amended Rule to this case is a fair and detailed analysis of the complaint. R. 2-11. It is apparent from the complaint that multiple claims are involved. It is also apparent that the judgment of the District Court would have been appealable under original Rule 54(b). The judgment of the District Court finally disposed of some claims, retaining others for trial. The claims remaining for trial—respondent's claim for inducing breach of his commission contract and Time Saver's claim for patent infringement and unfair competition with its tool business—are separate and distinct on pre-amendment standards from the claims based upon the destruction of respondent's lamp business and the antitrust and common law claims growing out of petitioner's predatory program of destruction of any business entered into by respondent. The judgment being appealable on pre-amendment tests and the findings prescribed by the amended Rule having been made, the judgment is appealable. Petitioner defaults on this issue.

Even if the judgment would not have been appealable under original Rule 54(b), it is nevertheless appealable

under amended Rule 54(b). All courts which have had to decide the issue have now adopted the so-called "affirmative view" of amended Rule 54(b), that is, that where the express determination and express direction are properly made in a multiple claims case, in accordance with the amended Rule, the judgment is appealable, whether or not appealable under original Rule 54(b). The First, Second, Third and Seventh Circuits, if not also the Fourth, have so expressed themselves. Other Circuits have considered the merits of appeals where the Rule 54(b) findings have been made, respecting these findings unless clearly erroneous.

The lone dissenting voice at present is that of the Court of Appeals for the District of Columbia which recently, by way of dictum, repeated its earlier dictum that it agreed with the decision of the Second Circuit in *Flegenheimer* v. *General Mills, Inc.*, 191 F.2d 237 (C.A. 2d 1951), which held that the amended Rule does not have such affirmative effect. *Capital Transit Co.* v. *District of Columbia*, ... F.2d ....., 21 Fed. Rules Serv. 54b.4, Case 7 (C.A.D.C. 1955). But the District of Columbia Circuit has never dismissed an appeal in a multiple claims case where the Rule 54(b) findings were made, and *Flegenheimer* has now been expressly overruled by the Second Circuit itself. *Rieser* v. *Baltimore & Ohio Railroad Co.*, 224 F.2d 198, 204 (C.A. 2d 1955). Upon the repudiation of *Flegenheimer*, the conflict in the Circuits previously existing has been removed. The Courts of Appeals are now virtually unanimous in their support of the validity of amended Rule 54(b) as affirmatively interpreted. Their opinion, after several years of experience in the actual administration of the amended Rule, should be given great weight.

Petitioner's brief is confined to an exposition of the so called "negative view" of the amendment to Rule 54(b). Under this view, the amendment gives no help in the determination of when a judgment is final and appealable, but only provides a way for the district court to indicate that its judgment is not final, by not making the express determination and direction for the entry of final judgment; if final judgment is entered in accordance with the amended Rule, it is only appealable, under the negative view, if it would have been appealable under original Rule 54(b). It is argued that the amendment was intended to have only this limited effect, and that if the amendment is interpreted affirmatively (*i.e.*, to make any judgments appealable which were not appealable under the original Rule), it is invalid.

The draftsmen of the amendment have repeatedly stated that the amended Rule was intended to have affirmative effect. The language of the amendment expresses this intention. The words "final judgment", which do not appear in the original Rule, were used in the amended Rule to describe the judgment to be entered by the District Court. "Final judgment" connotes appealability, particularly where followed by the concluding sentence of the amended Rule providing that in the absence of the required findings the action does not terminate and the decision is tentative and subject to revision by the District Court.

Perhaps the clearest indication of the intention that the amendment have the affirmative effect the authors claim for it is its general purpose, acknowledged by petitioner, to clarify and give certainty in this confused area. It is true that in those multiple claims cases where there is just reason for delay and therefore the Rule 54(b) findings are not made, certainty is being achieved as litigants become familiar with the amended Rule. But if

the effect of the amendment is confined to cases where the certificate is withheld by the trial judge, the certainty achieved in these cases will be at the cost of greater uncertainty and confusion in cases where the Rule 54(b) findings are made. For in any case in which a district court complies with Rule 54(b) and enters final judgment, the losing party cannot in safety refrain from appealing, lest in a later appeal he be met with the argument that he should have appealed from this final judgment. See *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950).

The mechanics of the application of the amended Rule provide still another indication of the intention that the amendment be given affirmative effect. If the amendment had been intended to have only a negative effect, merely giving the district courts power to postpone appealability, it would seem that it would have provided a way for the district courts to accomplish this purpose by some prescribed act. It is accomplished now only by non-action. the non-entry of the findings prescribed by the amended Rule. Thus, under the negative view, the alleged purpose of the amended Rule is accomplished by non-action, while the action which it prescribes in detail for the entry of final judgment would add nothing to the situation under the original Rule.

Except for petitioner, only *Flegenheimer*, now expressly overruled, suggested that the amendment was not intended to have affirmative effect. All other xpressions of the negative view attacked the affirmative view on the question of the power of this Court to effect such a change in appealability by an exercise of its rule-making power.

This Court's power to effect the change made by Rule 54(b), as affirmatively interpreted, is squarely supported

by the decision in *Reeves* v. *Beardall*, 316 U.S. 283 (1942). That case upheld the validity of original Rule 54(b) under which certain judgments which were not appealable under the pre-Rules practice became appealable by virtue of the Rules. No change was made in the jurisdiction of the appellate courts either by original Rule 54(b) or by the amendment. Jurisdiction is conferred by Section 1291 and its predecessors. The Rules, including many other than 54(b), merely regulate the procedure in the district courts. Such Rules necessarily affect appealability, but this does not render them invalid.

Even the negativists conceded that the amendment can prevent appeals of judgments appealable under original Rule 54(b) and even under pre-Rules practice, if the judge withholds the findings required by the amended Rule. Accelerating appealability under the affirmative view of the amended Rule no more affects appellate jurisdiction than does postponing appealability under the negative view. However characterized, the change resulting from the affirmative interpretation of amended Rule 54(b), from the practice under original Rule 54(b), is in all respects similar to the change caused by original Rule 54(b), which was universally approved, from the practice prevailing prior to the Rules.

This is the kind of case for which both original Rule 54(b) and the amended Rule were intended, and the amended Rule as here applied is valid. The Court of Appeals therefore correctly denied petitioner's motion to dismiss the appeal.

ARGUMENT.

I. The judgment of the District Court would have been appealable prior to the amendment to Rule 54(b); the requisite findings having been made in accordance with the amended rule, the judgment is appealable.

a. The Court should consider the appealability of the judgment of the District Court on pre-amendment tests.

The Court of Appeals expressly declined to pass upon the appealability of the District Court's judgment under original Rule 54(b) (R. 46), and rested its decision on the amendment to Rule 54(b). In doing so, it suggested that this Court should determine the validity of amended Rule 54(b) in order to reconcile divergent views among and within the Court of Appeals. R. 44. This divergence of views has been substantially reduced, if not eliminated, so that the need for such a determination has been correspondingly reduced. In any event, this case may not present the opportunity for such a determination, since the judgment appealed from would have been appealable on pre-amendment tests.

All courts and all judges, including those who have adhered to the so-called "negative" view of the Amended Rule,[2] have agreed that a judgment which would have been appealable under original Rule 54(b) prior to its amendment, is appealable now if the express determination and express direction are made in accordance with the

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[2] **Flegenheimer v. General Mills, Inc.**, 191 F. 2d 237, 241 (C.A. 2d 1951); **Bendix Aviation Corp. v. Glass**, 195 F. 2d 267 (C.A. 3rd 1952), concurring opinion of Judge Hastie at p. 280. See concurring opinion of Judge Frank in **Pabellon v. Grace Line, Inc.**, 191 F. 2d 169, 176 (C.A. 2d 1951), **cert. denied**, 342 U.S. 893 (1951).

amended Rule.[3] Accordingly, if the judgment of the District Court would have been appealable prior to the amendment to Rule 54(b), the Court of Appeals properly denied petitioner's motion to dismiss the appeal.

This ground alone is sufficient to dispose of this case, without considering the effect of the amendment to Rule 54(b). Yet petitioner has nowhere argued or even suggested that the judgment of the District Court would not have been appealable on pre-amendment tests. Rather, petitioner asks this Court to reverse the Court of Appeals' decision based upon the effect of the amended Rule and to remand the case to that court for a consideration of the appealability of the judgment of the District Court on pre-amendment tests.[4] Petitioner's Brief, p. 50. In the interest of preventing piecemeal appeals, this Court is asked to ignore other grounds for affirmance and to decide only if the *reasoning* of the Court of Appeals was correct,

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[3] 6 Moore's Federal Practice, Second Edition (1953), p. 221.

[4] The effect of such a disposition will be to delay further this already protracted litigation. Consider its history: The complaint was filed on May 21, 1953. R. 2. On July 14, 1953, petitioner filed a motion to dismiss the entire complaint on 29 grounds. R. 11-17. Approximately five months later, petitioner filed an amended motion to dismiss the complaint (except Count III, which it answered, R. 17-18), abandoning most of the 29 grounds urged in its original motion. R. 18-20. After delays in the filing of petitioner's brief, the District Court delivered its memoranda on May 12, 1954 (R. 20-33) and May 13, 1954 (R. 34). On May 19, 1954, the District Court entered its order and judgment in the form submitted and approved by petitioner. R. 34-36. See p. 8 of petitioner's "Memorandum of Law in Support of Defendant's Motion to Dismiss the Appeal," filed in the Court of Appeals: "Attorneys for defendant approved the order, understanding that a final appealable order was being entered pursuant to Rule 54(b)." Notice of appeal was filed on June 8, 1954. R. 36. On November 15, 1954, after respondent had filed the printed record and his printed brief in the Court of Appeals, petitioner moved to dismiss the appeal or to extend time for its brief, and in any event, to postpone oral argument of the appeal. R. 39.

presumably leaving for a later appeal the determination of whether the decision was correct on other grounds.

b. The judgment of the District Court would have been appealable under original Rule 54(b), though not under the pre-Rules practice.

Prior to the Federal Rules of Civil Procedure, it was well settled that, except in certain special situations, a judgment was ordinarily not appealable unless it was "final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." *Collins* v. *Miller,* 252 U.S. 364, 370 (1920). *Arnold* v. *United States,* 263 U.S. 427 (1923); *Nyanza Steamship Co.* v. *Jahncke Dry Dock No. 1,* 264 U.S. 439 (1924). The recognized exceptions were mainly three: First, statutory exceptions for certain specified interlocutory orders, now embodied in Section 1292 of Title 28. Second, orders disposing of "matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy." *United States* v. *River Rouge Improvement Company,* 269 U.S. 411, 414 (1926). *Withenbury* v. *United States,* 72 U.S. 819 (1867); *Trustees* v. *Greenough,* 105 U.S. 527 (1882); *Williams* v. *Morgan,* 111 U.S. 684 (1884); *Central Trust Co.* v. *Grant Locomotive Works,* 135 U.S. 207 (1890); *Hill* v. *Chicago & Evanston Railroad Co.,* 140 U.S. 52 (1891). See *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U.S. 541 (1949). Third, orders which result in the transfer of property or other acts, where if no appeal is allowed immediately, the right to review may be defeated. *Forgay* v. *Conrad,* 6 How. 201, 12 L. Ed. 404, (1848). See *Cobbledick* v. *United States,* 309 U.S. 323, 324-325 (1940).

The statutory requirement of finality as a condition of appealability has, for all practical purposes, been unchanged since the Judiciary Act of 1789.[5] The non-statutory exceptions to the rule of finality stated in *Collins* v. *Miller* were developed by court decisions with no material change in the statute limiting appellate jurisdiction to review of final judgments.

The merger of law and equity and the liberalization of permissive joinder resulting from the adoption of the Federal Rules increased the number and importance of multiple claim actions. Original Rule 54(b) was intended to regulate the procedure in the District Courts affecting appeals in such cases. No change was made in the jurisdictional requirement of finality; nor was any such change intended. 28 U.S.C. §2072. *Sibbach* v. *Wilson,* 312 U.S. 1, 10 (1941). Original Rule 54(b) merely redefined the judicial unit to which the requirement of finality attaches by providing for the entry of judgment in a multiple claims suit upon a particular claim and all counterclaims arising out of the transaction which is the subject-matter of such claim. 6 Moore's Federal Practice, Second Edition (1953), pp. 6, 21, 162-165, 167-169. Such judgments under original Rule 54(b) were consistently held to be final and appealable. While appellate jurisdiction was not thereby affected, appeals were permitted under original Rule 54(b) which had not been allowed under the pre-Rules practice requiring a complete disposition of all claims involved in the litigation. *Ibid*, pp. 7-8, 165.

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[5] The 1789 provision read as follows:

"That final decrees and judgments in civil actions in a district court . . . may be reexamined and reversed or affirmed in a circuit court. . . ." 1 Stat. 73, 84.

Section 1291 now reads:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ." 28 U.S.C. § 1291, 62 Stat. 929.

This change was first recognized in *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83 (C.A. 2d 1939), in which the Second Circuit overruled its pre-Rules decision in *Sheppy* v. *Stevens*, 200 Fed. 946 (C.A. 2d 1912), and by virtue of original Rule 54(b) held appealable a judgment which it conceded would not have been appealable prior to the Federal Rules. The case involved two claims by one plaintiff against one defendant. One claim was for copyright infringement and the other for unfair competition, the former based upon the use of the content of plaintiff's copyrighted book as the subject-matter of a motion picture, the latter based upon the use of the title of the book as the title of the motion picture.

In *Reeves* v. *Beardall*, 316 U. S. 283 (1942), this Court expressly approved the decision in *Collins* v. *Metro-Goldwyn Pictures Corp.*, upheld the validity of original Rule 54 (b), and restated the doctrine that the statutory requirement of finality could be satisfied by a final disposition of less than the entire litigation. In so doing, it answered most, if not all, of the arguments made here by petitioner.

The *Reeves* complaint was in three counts. Count I was a claim against an executor on a promissory note executed by the decedent. Count II was a claim against the executor on a contract in which decedent had agreed not to change her will in consideration of plaintiff's return of certain securities and plaintiff's promise not to press for payment of the note. Count III was a claim against a third party, Hamer, to recover assets which formerly belonged to decedent and which plaintiff claimed under the contract with decedent.

Count II was dismissed and the District Court ordered that "final judgment" be entered on Count II in favor of defendant. The Court of Appeals for the Fifth Circuit

dismissed plaintiff's appeal on the ground that the order appealed from was not final. Because of the conflict with *Collins* v. *Metro-Goldwyn Pictures Corp.*, this Court granted *certiorari*. 316 U.S. 283, 284. It reversed the decision of the Court of Appeals for the Fifth Circuit and held the order final and appealable.

The Court stated that original Rule 54(b) and the provisions of the Federal Rules with respect to joinder and separate trials indicated a "definite policy" (the Court quoting from *Collins* v. *Metro-Goldwyn Pictures Corp.*) to permit the entry of a separate judgment where the claims are entirely distinct:

> ". . . Such a separate judgment will frequently be a final judgment and appealable, though no disposition has been made of the other claims in the action. . . .
>
> "The Rules make it clear that it is 'differing occurrences or transactions, which form the basis of separate units of judicial action'. *Atwater* v. *North American Coal Corp.* (CCA 2d) 111 F (2d) 125, 126 . . . If a judgment has been entered which terminates the action with respect to such a claim, it is final for purposes of appeal. . . ." 316 U.S. 283, 285.

Applying these standards to the judgment in *Reeves* v. *Beardall*, the Court stated that the claim on the promissory note arose out of a transaction wholly separate from the claim not to change the will. It also noted that Hamer's liability could arise only if the contract not to change the will was sustained, so that it was not a case of dismissing one of two defendants alleged to be jointly liable on the same claim.

Reeves v. *Beardall* established the tests to be used in the application of original Rule 54(b). In a multiple claims case, a judgment finally disposing of a separate

and distinct claim is appealable notwithstanding other claims between the same parties remain for trial. The effect of the Rule as thus authoritatively interpreted was to make certain judgments appealable which had not been prior to the Rules.

Tested on the standards of *Reeves* v. *Beardall* and *Collins* v. *Metro-Goldwyn Pictures Corp.*, the judgment of the District Court in this case would have been final and appealable under original Rule 54(b). Respondent's claims are separate and distinct from each other and from those of Time Saver. This is not a case where one act or event gives rise to several legal wrongs or one claim for relief is based on several grounds or legal theories. Three transactions, events or occurrences, separated in time and involving different business enterprises, and even different claimants, and a separate overall predatory program, are the basis of the multiple claims.

If claims based on Metro-Goldwyn's publication of one motion picture are separate and distinct (*Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83 (C. A. 2d 1939)), and claims based on decedent's note and decedent's contract not to change a will in consideration of forbearance on the same note are separate and distinct (*Reeves* v. *Beardall*, 316 U. S. 283 (1942)), surely claims based upon petitioner's various wrongful acts directed successively at respondent's lamp and commission businesses and his corporation's tool business are separate and distinct. Nor is this result altered by the fact that in addition to the separate claims based on the wrongs directed at the separate businesses, respondent has asserted claims based upon petitioner's continuing plan to destroy any business engaged in by respond-

ent. Petitioner's persistent pursuit of respondent is distinct from the acts by which this pursuit is accomplished.

The judgment of the District Court left for trial only Time Saver's tool-claims and respondent's claim based on inducing breach of his commissions contract. These are separate and distinct from each other and from respondent's lamp claim which was entirely removed from the case by this judgment. Hence, the judgment dismissing respondent's lamp claim, his antitrust claim and his common law claim based upon petitioner's predatory pursuit of him, would have been final and appealable under original Rule 54(b) on the authority of *Reeves* v. *Beardall*.*

The application of the principles of *Reeves* v. *Beardall* and *Collins* v. *Metro-Goldwyn Pictures Corp.* is illustrated both by the cases under original Rule 54(b) in which certain judgments were held to be final and appealable and by those in which other judgments were held to be non-final and accordingly non-appealable.

The following are representative examples of judgments held to be final under the original Rule on the authority of *Reeves* v. *Beardall* and *Collins* v. *Metro-Goldwyn Pictures Corp.*:

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* It is interesting to note that Judge Learned Hand, upon whom petitioner relies so heavily in its argument on the amended Rule (Petitioner's Brief, p. 10), was one of the judges who decided **Collins v. Metro-Goldwyn Pictures Corp.** It can hardly be doubted that he would have held the judgment here to have been appealable under the original Rule.

(a) Cases involving separate claims either of several claimants,[7] several defendants,[8] or several claimants and several defendants.[9]

(b) Cases involving multiple claims of a single claimant against one defendant.[10]

Both groups of cases support the appealability of the judgment of the District Court in this case under original Rule 54(b) tests. The application of *Reeves* v. *Beardall* is, however, more clearly illustrated by the latter group.

In *Karl Kiefer Machine Co.* v. *United States Bottlers Machinery Co.*, 108 F. 2d 469 (C.A. 7th 1939), decided prior to *Reeves* v. *Beardall*, a single plaintiff sued a single defendant for infringement of two patents by two separate acts. An order dismissing the count dealing with the claim of infringement of one of the patents was held to be final and appealable on the authority of *Collins* v. *Metro-Goldwyn Pictures Corp.*

Sidis v. *F-R Publishing Corp.*, 113 F. 2d 806 (C.A. 2d 1940), involved three claims by one plaintiff against one

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[7] **Gibbons v. Equitable Life Assurance Society, 173 F. 2d 337 (C.A. 2d 1949).**

[8] **Lydick v. Fischer, 135 F. 2d 983 (C.A. 5th 1943); Moreno v. United States, 120 F. 2d 128 (C.A. 1st 1941).**

[9] **Dickinson v. Petroleum Conservation Corp., 338 U.S. 507 (1950); California Apparel Creators v. Wieder of California, Inc., 162 F. 2d 893 (C.A. 2d 1947); cert. den. 332 U.S. 816 (1947); Crutcher v. Joyce, 134 F. 2d 809 (C.A. 10th 1943).**

[10] **Karl Kiefer Machine Co. v. United States Bottlers Machinery Co., 108 F. 2d 469 (C.A. 7th) 1939); Sidis v. F-R Publishing Corp., 113 F. 2d 806 (C.A. 2d 1940); Musher Foundation, Inc. v. Alba Trading Co., Inc., 127 F. 2d 9 (C.A. 2d 1942), cert. denied, 317 U.S. 641 (1942); Zalkind v. Scheinman, 139 F. 2d 895 (C.A. 2d 1943). See Hanney v. Franklin Fire Ins. Co. of Philadelphia, 142 F. 2d 864 (C.A. 9th 1944).**

defendant. Defendant's magazines were alleged to have contained matter damaging to plaintiff. One count was for damages for violation of plaintiff's right of privacy; another was for violation of rights under New York statutes; a third was for malicious libel under the laws of several other states. An order dismissing the first two counts was held appealable on the authority of *Collins* v. *Metro-Goldwyn Pictures Corp.* The court noted that different evidence of publication would be necessary in the proof of the claims.

Musher Foundation, Inc. v. *Alba Trading Co., Inc.*, 127 F.2d 9 (C.A. 2d 1942) and *Zalkind* v. *Scheinman*, 139 F. 2d 895 (C.A. 2d 1943), both involved a count for patent infringement and a count for unfair competition. In neither case was there jurisdiction based upon diversity of citizenship. In both, the District Courts dismissed the non-federal claim for want of federal jurisdiction on the authority of *Hurn* v. *Oursler*, 289 U.S. 238 (1933). In both, the Court of Appeals for the Second Circuit affirmed, holding that where a non-federal claim is dismissed because it does not allege merely a different ground for recovery for the same act that is the ground for a federal claim with which it is joined, the non-federal claim is a separate and distinct claim the final disposition of which is appealable under original Rule 54(b).

The cases which held district court judgments non-final and non-appealable under original Rule 54(b) are further evidence of the appealability of the judgment in this case on tests prevailing under the original Rule. They can be divided into two general categories: first, cases involving judgments which did not determine compulsory counterclaims as required by the very words of original

Rule 54(b),[11] and second, cases involving judgments which were not "internally final" in that they did not finally determine a single claim, such as judgments leaving the amount of damages for later determination,[12] judgments disposing of some but not all of the grounds asserted or elements of damages in cases involving single claims for relief,[13] judgments dismissing some but not all of defendants alleged to be jointly liable,[14] and judgments dismissing a claim with leave to amend.[15]

It is clear that the judgment of the District Court in this case does not fall into any of the foregoing categories.

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[11] **Audi Vision, Inc. v. RCA Manufacturing Co., Inc.**, 136 F. 2d 621 (C.A. 2d 1943); **Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp.**, 154 F. 2d 814 (C.A. 2d 1946); **Nachtman v. Crucible Steel Company of America**, 165 F. 2d 997 (C.A. 3rd 1948); **Toomey v. Toomey**, 149 F. 2d 19 (C.A.D.C. 1945); **Western Contracting Corp. v. National Surety Corp.**, 163 F. 2d 456 (C.A. 4th 1947). See also **Eastern Transportation Co. v. United States**, 159 F. 2d 349 (C.A. 2d 1947); **LoBue v. United States**, 178 F. 2d 528 (C.A. 2d 1949); **Parmelee v. Chicago Eye Shield Co.**, 157 F. 2d 582 (C.A. 8th 1946); **Schiel v. New York Life Ins. Co.**, 178 F. 2d 729 (C.A. 9th 1949).

[12] **Canister Co. v. National Can Corp.**, 163 F. 2d 683 (C.A. 3rd 1947); **Petrol Corp v. Petroleum Heat & Power Company**, 162 F. 2d 327 (C.A. 2d 1947).

[13] **United States v. Florian**, 312 U.S. 656 (1941); **Leonard v. Socony-Vacuum Oil Co.**, 130 F. 2d 535 (C.A. 7th 1942); **Munson Line, Inc. v. Green**, 165 F. 2d 321 (C.A. 2d 1948). See **Coffman Laboratories v. Federal Laboratories, Inc.**, 171 F. 2d 94 (C.A. 3rd 1948); **Wright v. Gibson**, 128 F. 2d 865 (C.A. 9th 1942). (See also, concurring opinion of Judge Clark in **Atwater v. North American Coal Corp.**, 111 F. 2d 125, 126 (C.A. 2d 1940); **Biggins v. Oltmer Iron Works**, 154 F. 2d 214 (C.A. 7th 1946).)

[14] **Dunaway v. Standard Oil Co.**, 178 F. 2d 884 (C.A. 5th 1949); **Hunteman v. New Orleans Public Serv. Inc.**, 119 F. 2d 465 (C.A. 5th 1941); **Photometric Products Corp. v. Radtke**, 157 F. 2d 849 (C.A. 2d 1946).

[15] **Atwater v. North American Coal Corp.**, 111 F. 2d 125 (C.A. 2d 1940).

It would certainly not have been held to be non-final under original Rule 54(b) on the authority of these cases. Multiple claims are involved. No counterclaims are left undetermined. And the disposition of each separate claim which was dismissed was internally final.

Thus, the judgment of the District Court meets the affirmative tests of *Reeves* v. *Beardall, Collins* v. *Metro-Goldwyn Pictures Corp.* and other cases involving final orders under original Rule 54(b) and does not come within the category of orders held to be non-final under the original Rule. It would, therefore, have been appealable under original Rule 54(b). The requisite finding under the amended Rule having been made, the order is appealable without regard to the effect of the amendment to the Rule. See *Burkhart* v. *United States,* 210 F.2d 602 (C.A. 9th 1954).

II. The judgment of the District Court is final and appealable under amended Rule 54(b), whether or not appealable under original Rule 54(b).

Petitioner's entire brief is devoted to amended Rule 54(b). Even so, it does not come to grips with the decisive question, to-wit: Is this a proper case for the application of the amended Rule and is the amended Rule valid as applied? This is the very kind of case to which both the original Rule and the amended Rule were intended to apply. And the amended Rule is valid as applied to this case.

a. The affirmative view of amended Rule 54(b) prevails; there is no longer a conflict in the Circuits.

Petitioner relies upon the decision of the Second Circuit in *Flegenheimer* v. *General Mills, Inc.,* 191 F.2d 237 (C.A. 2d 1951) (Petitioner's Brief, p. 10), just as it did in its

Petition for Certiorari urging a conflict within the Circuits as a reason for granting the writ. Petition for Certiorari, pp. 5-7. *Flegenheimer* has now been repudiated by the Second Circuit and the conflict accordingly eliminated.

The First,[16] Second,[17], Third,[18] possibly the Fourth,[19] and the Seventh Circuits[20] have expressly held that amended Rule 54(b) makes certain judgments appealable which would not have been under original Rule 54(b), and that the amended Rule is valid.[21] In addition, other Circuits, including even the District of Columbia Circuit,[22] have been consistently hearing appeals on the merits where the express determination and express direction are

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[16] **Boston Medical Supply Co. v. Lea & Febiger,** 195 F. 2d 853 (C.A. 1st 1952); **Francis v. Crafts,** 203 F. 2d 809 (C.A. 1st 1953).

[17] **Rieser v. Baltimore & Ohio Railroad Co.,** 224 F. 2d 198 (C.A. 2d 1955).

[18] **Bendix Aviation Corp. v. Glass,** 195 F. 2d 267 (C.A. 3rd 1952).

[19] **Town of Clarksville v. United States,** 198 F. 2d 238 (C.A. 4th 1952), **cert. denied,** 344 U.S. 927 (1953).

[20] **Mackey v. Sears Roebuck & Co.,** 218 F. 2d 295 (C.A. 7th 1955). R. 40-46.

[21] There is a suggestion of the rejection of the negative view by the Eighth Circuit in **Lockwood v. Hercules Powder Co.,** 172 F. 2d 775 (C.A. 8th 1949), in which no Rule 54(b) findings were made, but the opinion implies that such findings would have rendered the judgment appealable, though it would not have been prior to the amendment to Rule 54(b).

[22] **Capital Transit Co. v. District of Columbia,** ..... F. 2d ....., 21 Fed. Rules Serv. 54b.4, Case 7 (C.A. D.C. 1955); **Mow v. Republic of China,** ..... F. 2d ....., 21 Fed. Rules Serv. 54b.4, Case 6 (C.A. D.C. 1955); **Wiliams v. Protestant Episcopal Theological Seminary,** 198 F. 2d 595 (C.A. D.C. 1952), **cert. denied,** 344 U.S. 864, 344 U.S. 894 (1952); **Vale v. Bonnett,** 191 F. 2d 334 (C.A. D.C. 1951).

made in accordance with the amended Rule.[23] The only hangover of the *Flegenheimer* decision is in the District of Columbia Circuit which recently repeated, again by way of dictum, its earlier dictum in *Gold Seal Co.* v. *Weeks* 209 F.2d 802 (C.A. D.C. 1954), that it agrees with *Flegenheimer*. *Capital Transit Co.* v. *District of Columbia*, ... F.2d ....., 21 Fed. Rules Serv. 54b.4, Case 7 (C.A. D.C. 1955). Strangely, in its repetition of its reliance upon *Flegenheimer*, the District of Columbia Circuit in *Capital Transit* cited *Rieser* v *Baltimore & Ohio Railroad Co.* 224 F.2d 198 (C.A. 2d 1955), in which the Second Circuit overruled *Flegenheimer*. And the District of Columbia Circuit has never dismissed an appeal in a multiple claims case where the Rule 54(b) findings were made.[24]

The virtually unanimous view of the Courts of Appeals should be given great weight by this Court. The Courts of Appeals are charged with the supervision of the administration of the amended Rule, and reached their present agreement as to the interpretation of the amended Rule on the basis of several years of experience with its actual operation.

The former conflict, upon which petitioner relies, was between two views of the amendment, the prevailing one being generally described as "affirmative", the *Flegen-*

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[23] Fifth Circuit: **Buchanan v. Sinclair Oil & Gas Co.**, 218 F. 2d 436 (C.A. 5th 1955); **Kinnear-Weed Corp. v. Humble Oil & Refining Co.**, 214 F. 2d 891 (C.A. 5th 1954); **Oyster Shell Products Corp., Inc. v. United States**, 197 F. 2d 1022 (C.A. 5th 1952); Ninth Circuit; **Prickett v. Consolidated Liquidating Corp.**, 180 F. 2d 8 (C.A. 9th 1950). See **Waialua Agr. Co. v. Maneja**, 178 F. 2d 603 (C.A. 9th 1949). Eighth Circuit: See **Lockwood v. Hercules Powder Co.**, 172 F. 2d 775 (C.A. 8th 1949), footnote 21 above.

[24] In **Gold Seal**, the court held that multiple claims were not involved, while in **Capital Transit**, in which the **Gold Seal** dictum was repeated, the motion to dismiss the appeal was denied.

heimer view being generally described as "negative". Under the affirmative view, also referred to as the "Bendix Rule",[25] the effect of the amended Rule is to make certain judgments appealable that were not appealable prior to the amendment. The negative view, on the other hand, would confine the effect of the amendment to preventing appeals in cases where the express determination and express direction are not made; where the determination and direction are made, a judgment would be appealable under the negative view only if appealable under original Rule 54(b).

As previously stated, the affirmative view now prevails in all Circuits, with the possible exception of the District of Columbia Circuit. It is enthusiastically supported by Professor Moore, the leading text writer in this field and an important figure in the drafting of both the original Rule and the Amendment. 6 Moore's Federal Practice, Second Edition, pp. 5-9, 211.

The authorities for the negative view relied upon by petitioner are three—one decision of the Second Circuit,[26] now expressly overruled;[27] one concurring opinion in the Third Circuit,[28] never repeated; and dictum in two cases in the District of Columbia Circuit,[29] based expressly on

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[25] **Bendix Aviation Corp v. Glass, 195 F. 2d 267 (C.A. 3rd 1952).**

[26] **Flegenheimer v. General Mills, Inc., 191 F. 2d 237 (C.A. 2d 1951).**

[27] **Rieser v. Baltimore & Ohio Railroad Co., 224 F. 2d 198 (C.A. 2d 1955).**

[28] **Bendix Aviation Corp. v. Glass, 195 F. 2d 267, 277-282 (C.A. 3rd 1952).**

[29] **Gold Seal Co. v. Weeks, 209 F. 2d 802 (C.A. D.C. 1954); Capital Transit Co. v. District of Columbia, ... F. 2d ....., 21 Fed. Rules Serv. 54b.4, Case 7 (C.A. D.C. 1955).**

the now repudiated *Flegenheimer* decision of the Second Circuit.

The conflict relied on by petitioner terminated with the decision in *Rieser* v. *Baltimore & Ohio Railroad Co.*, 224 F.2d 198 (C.A. 2d 1955), in which the Second Circuit expressly overruled *Flegenheimer*, stating that that decision "cannot be taken as the present law of this Circuit". 224 F.2d 198, at p. 204. Judge Frank, who had been one of the exponents of the negative view,[30] acknowledged in a concurring opinion that two recent decisions of the Second Circuit[31] had overruled *Flegenheimer*. 224 F.2d 198, at pp. 205-206. See also, *Colonial Airlines, Inc.* v. *Janas*, 202 F.2d 914 (C.A. 2d 1953); *Phelan* v. *Middle States Oil Corp.*, 203 F.2d 836 (C.A. 2d 1953); *Republic of Italy* v. *DeAngelis*, 206 F.2d 121 (C.A. 2d 1953); *Cohen* v. *LaVin*, 210 F.2d 550 (C.A. 2d 1954); *Filt-O-Pure Products Corp.* v *Chemex Corp.*, 222 F.2d 424 (C.A. 2d 1955).

With the repudiation of *Flegenheimer* by the Second Circuit, there is no longer a conflict among the Circuits. The *Bendix* rule prevails, giving affirmative effect to the amended Rule in accordance with the intention of its draftsmen.

b. The amendment to Rule 54(b) was intended to have the affirmative effect of making certain District Court judgments appealable whether or not appealable under original Rule 54(b).

Petitioner reluctantly concedes that Judge Clark and Professor Moore, the principal authors of the amendment to Rule 54(b), intended it to have "affirmative" effect, *i.e.*, to make appealable certain orders not previously appeal-

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[30] Concurring opinion in **Pabellon v. Grace Line, Inc.**, 191 F. 2d 169 (C.A. 2d 1951), **cert. denied**, 342 U.S. 893 (1951).

[31] **Rao v. Port of New York Authority**, 222 F. 2d 362 (C.A. 2d 1955); **United Artists Corp. v. Masterpiece Products, Inc.**, 221 F. 2d 213 (C.A. 2d 1955).

able. Petitioner's Brief, p. 18, n. 3. Both have repeatedly stated that this was their intention. 6 Moore's Federal Practice, Second Edition, 1953, pp. 7-8, 205-207, 211, 225. *Pabellon* v. *Grace Line, Inc.*, 191 F. 2d 169 (C.A. 2d 1951), *cert. denied*, 342 U.S. 893 (1951); *Lopinsky* v. *Hertz Drive-Ur-Self Systems, Inc.*, 194 F. 2d 422 (C.A. 2d 1951). See *Telechron, Inc.* v. *Parissi*, 197 F. 2d 757, 759 (C.A. 2d 1952).

Professor Moore states the purposes of the amendment as follows:

> "Amended Rule 54(b) has three goals: (1) to restrict appeals in litigation involving multiple claims; (2) to give the district court discretionary power to enter a final judgment upon one or more but less than all of the claims; and (3) to reduce the uncertainty as to finality, in connection with an adjudication by the district court." 6 Moore's Federal Practice, Second Edition (1953), pp. 205-206. See *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 269 (C.A. 3rd 1952).

In discussing the discretion given the district courts, Professor Moore states unequivocally that "some adjudications are now final and hence appealable as such, that would not have been under original Rule 54(b) or the pre-Rules practice." Moore, op. cit., p. 207.

The purpose of restricting appeals is accomplished in those cases where there *is* just reason for delay, and accordingly, the district courts do not direct the entry of final judgment. This is so under either the negative or the affirmative view. But the purpose of reducing uncertainty cannot be accomplished if the "negative" view is adopted. If the amendment's effect is confined, as petitioner insists, to cases in which the Rule 54(b) findings are not made, certainty in such cases will have been achieved at the cost of uncertainty and multiplicity of piecemeal appeals in cases in which the findings are made.

Consider respondent's dilemma in this case if the negative view prevails. Judgment is entered in accordance with Rule 54(b) in form agreed upon by the parties. The parties want it to be final and appealable, and the parties and the District Court think it is final and appealable. Surely, respondent could not refrain from appealing and run the risk that a later appeal would be dismissed on the ground that this judgment was final. See *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950). In the face of a district court's express determination of no just reason for delay and express direction for the entry of judgment, every cautious litigant will be compelled to appeal to protect his right to appeal. If the effect of the Rule 54(b) findings is to require the losing litigants to appeal, as surely it is, such judgments ought to be appealable.

The intention of the draftsmen of the amended Rule is evidenced by the language used. The judgment which the court may order is described as "a final judgment" and such a judgment is to be entered only where "there is no just reason for delay." In the original Rule, the comparable provisions were "may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of. * * *"

With the experience under the original Rule clearly in mind, the use of the words "final judgment" to describe the action of the District Court, could hardly have had any purpose other than to make such judgments appealable, as the draftsmen state. "Final" in this context is a word of art connoting appealability. Particularly is this so where the provision for final judgment is followed by the concluding sentence of the amended Rule stating that where the determination and direction are not made, the

decision is subject to revision—hence not appealable—until judgment is entered on all claims.

The structure of the amended Rule is further evidence of the intent of the draftsmen that a final judgment entered in accordance therewith be appealable, without regard to its appealability under the original Rule. The amendment describes with particularity the manner in which a "final judgment" is to be entered. No way is prescribed for the entry of a non-final judgment; the amended Rule merely states that if its final judgment requirements are not met, the decision of the trial judge upon the particular claim "shall not terminate the action". If the amended Rule was intended to provide nothing more than a device to indicate non-finality, it was certainly an inversion to create such a device by particularizing acts indicating finality, with non-finality to be indicated only by the non-performance of the acts of finality.

There is no basis for the argument that the amended Rule was not *intended* to have affirmative effect. Except for the now repudiated statement in *Flegenheimer* and the argument in petitioner's brief, none of the exponents, or rather former exponents, of the negative view, suggested that affirmative effect was not intended. Rather, they attacked the amended Rule as exceeding this Court's rule-making power. See concurring opinions in *Bendix Aviation Corp.* v. *Glass*, 195 F.2d 267, 277-282 (C.A. 3rd 1952), and *Pabellon* v. *Grace Line, Inc.*, 191 F.2d 169, 176-181 (C.A. 2d 1951), *cert. denied*, 342 U.S. 893 (1951).[32] The questions of power are easily

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[32] **Gold Seal Co. v. Weeks, 209 F. 2d 802 (C.A. D.C. 1954) and Capital Transit Co. v. District of Columbia, ... F. 2d, ..., 21 Fed. Rules Serv. 54b.4, Case 7 (C.A. D.C. 1955), merely state, by way of dictum in both cases, that the District of Columbia Circuit follows Flegenheimer. In Capital Transit, the District of Columbia Circuit cites Rieser v. Baltimore & Ohio Railroad Co., 224 F. 2d 198 (C.A. 2d 1955), without noting that it expressly overruled Flegenheimer.**

resolved. See below, pp. 32-37. And both the Third Circuit[33] and the Seventh Circuit,[34] in their expressions of the affirmative view, have considered and rejected the *Flegenheimer* suggestion that affirmative effect was not intended. With the repudiation of *Flegenheimer itself*,[35] petitioner stands alone on this issue. All authorities now agree that affirmative effect was intended.

c. The amendment to Rule 54(b) is valid as affirmatively interpreted.

Intent aside, the principal reason given by those adhering to the negative view is that the amended Rule would be invalid if given affirmative effect. Concurring opinions in *Pabellon* v. *Grace Line*, 191 F.2d 169, 176-181 (C.A. 2d 1951), *cert. denied*, 342 U.S. 893 (1951), and *Bendix Aviation Corp.* v. *Glass*, 195 F.2d 267, 277-282 (C.A. 3rd 1952). Under this view, it is beyond the rule-making power of this Court to make judgments appealable which would not have been appealable prior to the change in the Rules; such an effect would result in a modification of appellate jurisdiction, and therefore conflict with statutes fixing such jurisdiction.

In the first place, this negative view overlooks or at least misses the import of this Court's decision in *Reeves* v. *Beardall*, 316 U.S. 283 (1942). For, as affirmatively interpreted to make appealable certain orders not appealable prior to the amendment, the amended Rule effects no greater change than that effected by the original

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[33] **Bendix Aviation Corp. v. Glass, 195 F. 2d 267, 269 (C.A. 3rd 1952).**

[34] **Mackey v. Sears, Roebuck and Co., 218 F. 2d 295, 298 (C.A. 7th 1955). R. 45.**

[35] **Rieser v. Baltimore & Ohio Railroad Co., 224 F. 2d 198 (C.A. 2d 1955).**

Rules. If original Rule 54(b) was a valid exercise of this Court's rule-making power notwithstanding it effected such a change—as was held by *Reeves* and the many cases under the original Rule—so is the amended Rule.

Secondly, the amendment does not change appellate jurisdiction. The statutory jurisdictional requirement of finality remains. 28 U.S.C. §1291. A judgment disposing of a particular claim in a multiple claims case must be a complete and final disposition of that claim, just as it would have to be a complete and final disposition of it if it were the sole claim in suit. The statutory concept of finality looks to internal finality, that is, complete disposition of the particular claim. It does not require complete disposition of the entire litigation. This is the import of the decisions both before and under the original Rules, carving out of the entire litigation, separate judicial units for separate and final and appealable disposition.

In the words of Professor Moore:

> ". . . The smallest judicial unit which would support the rendition of a final judgment was no longer to be a claim and a compulsory counterclaim, if any; but was to include all types of claims arising out of a single transaction or occurrence.
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> ". . . Under amended Rule 54(b), the action involving multiple claims is in its entirety a judicial unit, subject to the power of the district court to treat an adjudication of any one or more claims as a judicial unit and direct the entry of a final judgment thereon, provided it makes 'an express determination that there is no just reason for delay' and 'an express direction for the entry of judgment.'

> "While this standard of finality does affect the appeality of orders, the rule does not attempt to modify or supersede the appellate jurisdictional statutes, which generally require a final judgment as a prerequisite to an appeal, although they allow interlocutory appeals in certain instances. Operating as it does within the framework of the jurisdictional statutes, amended Rule 54(b) is valid despite some judicial views to the contrary." 6 Moore's Federal Practice, Second Edition (1953), pp. 7-8.

The affirmative effect of the amendment does not make any judgments final which do not completely dispose of a particular claim for relief.[36] It does, however, make judgments finally disposing of a particular claim appealable without regard to the status of other claims in the litigation and without regard to the relationship of the particular claim to the other claims. Thus, the change wrought by the amendment is not in the statutory concept of finality, but only in the timing of appeals where there are multiple claims and some but not all are finally disposed of.

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[36] **Gold Seal Co. v. Weeks**, 209 F. 2d 802 (C.A. D.C. 1954); **United States Plywood Corp. v. Hudson Lumber Co.**, 210 F. 2d 462 (C.A. 2d 1954); **Leonidakis v. International Telecoin Corp.**, 208 F. 2d 934 (C.A. 2d 1953); See **Kuly v. White Motor Co.**, 174 F. 2d 742 (C.A. 6th 1949). With respect to cases involving one claim against several defendants, compare **District 65, Distributive, Processing and Office Workers' Union v. McKague**, 216 F. 2d 153 (C.A. 3rd 1954); **Steiner v. 20th Century-Fox Film Corp.**, 220 F. 2d 105 (C.A. 9th 1955); **Hardy v. Bankers Life & Casualty Co.**, 222 F. 2d 827 (C.A. 7th 1955); and **Brandt v. Renfield Importers, Ltd.**, 216 F. 2d 206 (C.A. 8th 1954); with **Boston Medical Supply Co. v. Lea & Febiger**, 195 F. 2d 853 (C.A. 1st 1952); and **Vale v. Bonnett**, 191 F. 2d 334 (C.A. D.C. 1951). See **United Artists Corp. v. Masterpiece Products, Inc.**, 221 F. 2d 213 (C.A. 2d 1955). See **Waialua Agr. Co. v. Maneja**, 178 F. 2d 603 (C.A. 9th 1949). 6 Moore's Federal Practice, Second Edition (1953), pp. 182, 245-248. See also cases cited at p. 45 of petitioner's brief.

Again, in the words of Professor Moore:

> ". . . There is no warrant in Rule 54(b) for the district court to make a final judgment out of a partial adjudication of a claim: even though the court makes the 'express determination' and the 'express direction' it must have adjudicated at least one or more claims so that the adjudication measures up to the general principles of finality" 6 Moore's Federal Practice, Second Edition (1953), p. 8.

The courts which have adhered to the affirmative view of the amended Rule have recognized this concept of internal finality and have generally described the effect of the amendment as procedural, that is, dealing with district court mechanics affecting appeals but not with appellate jurisdiction. The court below, for example, likens the effect of the amendment to that of Rule 73(a) shortening the time for taking an appeal. In this sense, appealability is affected, though no change is made in the jurisdictional requirement of finality. In the words of the court below, whether the district judge withholds a certificate to prevent an appeal, or grants a certificate to permit an appeal, he "is timing his final decision on less than all of the claims in a multiple claims suit. Under either approach, the jurisdiction of the court of appeals is indirectly affected. We think that the rule-making authority of the Supreme Court existed as to all procedural matters and activities in the district court even though they might consequentially affect appellate jurisdiction." 218 F. 2d 295, 299. R. 46.

Similarly, in *Winsor* v. *Daumit*, 179 F. 2d 475 (C. A. 7th 1950), the Court of Appeals for the Seventh Circuit upheld the validity of the amendment against attack in a case where no findings were made, stating: "We think also, that the rule should not be considered as curtailing appellate jurisdiction but rather as one fixing the proce-

dure of the district court as to conditions affecting terms upon which an appeal may be taken in advance of a determination of the entire case." 179 F. 2d 475, 478.

The Court of Appeals for the Third Circuit describes the amendment as a "procedural rule" and notes that many procedural rules affect appealability and the timing of appeals, but do not, and do not purport to, enlarge or contract appellate jurisdiction. *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 271 (C. A. 3rd 1952). See *Lopinsky* v. *Hertz Drive-Ur-Self Systems, Inc.*, 194 F. 2d 422 (C. A. 2d 1951).

Thirdly, as stated by the court below, appellate jurisdiction is just as much affected by the withholding of a certificate by the district judge to prevent appealability of a judgment admittedly final under pre-amendment tests, as it is by permitting an appeal of a judgment not previously appealable. 218 F. 2d 295, 299, R. 46. Yet, the negativists conceded, as does petitioner, that the amendment has this effect and is valid if given only this effect. Petitioner's brief, p. 22. It is difficult to understand how it can be within this Court's rule-making power to provide a way to postpone appealability of judgments formerly appealable and yet be beyond its power to accelerate appealability of judgments not previously appealable, but which finally dispose of a particular claim.

Petitioner emphasizes the statement of Mr. Justice Brandeis in *Washington-Southern Co.* v. *Baltimore Co.*, 263 U.S. 629, 635 (1924), that "no rule of court can enlarge or restrict jurisdiction." Petitioner's Brief, pp. 29-30. To the extent that it is in point in this case, the statement supports respondent's position rather than that of petitioner. It can be assumed that in adopting amended Rule 54(b), just as in adopting the original Rules, this Court

had well in mind this limitation upon its power. 28 U.S.C. § 2072. See *Sibbach* v. *Wilson*, 312 U.S. 1 (1941). The Court therefore did not intend to restrict or enlarge appellate jurisdiction and did not consider that the amended Rule had this effect. That these assumptions are correct is clearly demonstrated by the validity attributed to the negative effect of the amendment by all courts. If the amendment as affirmatively interpreted enlarges appellate jurisdiction, so necessarily does the negative effect restrict appellate jurisdiction. The plain fact is that jurisdiction, as that phrase is used by Mr. Justice Brandeis, is not affected under either view. Appellate jurisdiction is still fixed by statute, but this Court may nevertheless affect the timing of appeals by regulating procedure in the district courts.

Finally, such change as is effected by the amended Rule is sanctioned by Congress in the same manner as were the original Federal Rules; like the original Rules, the amendment has the force of statute. *Bendix Aviation Corp.* v. *Glass*, 195 F.2d 267, 272 (C.A. 3rd 1952). The court below made this point in its opinion in this case (R. 45), just as it did in *Winsor* v. *Daumit*, 179 F.2d 475, 477 (C.A. 7th 1950).

The amendment is, therefore, valid as an exercise of this Court's rule-making power."

" Rule 82 and the Enabling Act, 28 U.S.C. § 2072, add little to the discussion. Both indicate that the Federal Rules were intended to deal only with procedure in the district courts. This is conceded. Neither deals with the question of what judgments are appealable under Section 1291 or the extent to which the timing of appeals can be affected by procedure in the district courts.

d. The Courts of Appeals can and do review the findings of the district courts under amended Rule 54(b); the District Courts do not automatically and conclusively determine appellate jurisdiction.

The findings of the district courts do not, under the affirmative view, automatically and conclusively determine appellate jurisdiction, as is repeatedly suggested by petitioner. The findings of the district courts are reviewable and have been reviewed by the Courts of Appeals. Upon such review, the Courts of Appeals determine whether multiple claims for relief are in fact involved and whether the District Court has finally disposed of one such claim.

> ". . . Since under the Rule the district court has the power by certificate to attach finality only to an adjudication that finally disposes of one or more but less than all the claims, the certificate is not conclusive upon the appellate court that such an adjudication has been made." 6 Moore's Federal Practice, Second Edition (1953), p. 270.

There has not been a single decision in which a Court of Appeals has indicated that it was unable to review the correctness of the application of the amended Rule. On the contrary, there are several cases in which appeals have been dismissed notwithstanding the express determination and express direction of the district court.[38] There are many more—including one by the court below—[39] in which no Rule 54(b) findings were made and the Courts of Appeals stated that even if the findings had been made, the judgments would not have been appeal-

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[38] **King v. California Co., 224 F. 2d 193 (C.A. 5th 1955); Gold Seal Co. v. Weeks, 209 F. 2d 802 (C.A. D.C. 1954); Leonidakis v. International Telecoin Corp., 208 F. 2d 934 (C.A. 2d 1953); United States Plywood Corp. v. Hudson Lumber Co., 210 F. 2d 462 (C.A. 2d 1954); Steiner v. 20th Century-Fox Film Corp., 220 F. 2d 105 (C.A. 9th 1955). Cf. Phelan v. Middle States Oil Corp., 203 F. 2d 836 (C.A. 2d 1953). See Waialua Agr. Co. v. Maneja, 178 F. 2d 603 (C.A. 9th 1949).**

[39] **Hardy v. Bankers Life & Casualty Co., 222 F. 2d 827 (C.A. 7th 1955).**

able.[40] There is therefore no substance to this argument to which most of petitioner's brief is devoted.

e. This is a proper case for the application of amended Rule 54(b).

This is the kind of case for which original Rule 54(b) was adopted. The joinder of several causes of action arising out of several separate and distinct events, permitted under the original Rules, necessitated an accommodation of the standards of finality prevailing under the pre-Rules practice. Original Rule 54(b) and the decisions thereunder did not sole all of the problems of this accommodation, and the amended Rule was adopted in the light of and to remove some of these difficult problems. That it may not have solved all problems (Petitioner's Brief, pp. 37-46) or that additional legislation may be desirable (Petitioner's Brief, pp. 46-50), does not mean that the amended Rule is invalid or should not be given full effect.

One of the principal purposes of the amendment was "to reduce the uncertainty as to finality." 6 Moore's Federal Practice, Second Edition (1953), pp. 205-206. It is respondent's position that under original Rule 54(b) the judgment of the District Court would have been final and appealable. See above, pp. 13-24. But assuming, *arguendo*, that the judgment was not clearly appealable

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[40] **District 65, Distributive, Processing and Office Workers' Union v. McKague, 216 F. 2d 153 (C.A. 3rd 1954); Youpe v. Moses, 213 F. 2d 613 (C.A. D.C. 1954); Newburgh Moire Co., Inc. v. Superior Moire Co., Inc., 218 F. 2d 580 (C.A. 3rd 1955); Kuly v. White Motor Co., 174 F. 2d 742 (C.A. 6th 1949); Flanagan v. Northern Lumber Co., Inc., 222 F. 2d 539, (C.A. 2d 1955). See Brandt v. Renfield Importers, Ltd., 216 F. 2d 206 (C.A. 8th 1954); Farmer v. Powers, 204 F. 2d 509 (C.A. 5th 1953).**

on pre-amendment standards, it surely was not clearly non-appealable. At most, the appealability under the original Rule would have been uncertain. It was to eliminate uncertainty in this kind of situation that discretion was given to the district judges under the amended Rule. Hence, even if the question is doubtful under original Rule 54(b), the discretion of the District Court should be respected here. 6 Moore's Federal Practice, Second Edition (1953), p. 239-240. This may explain petitioner's default on the entire question of the appealability of this judgment under pre-amendment tests. Petitioner cannot demonstrate non-appealability; and even if it could create doubts as to appealability under the original Rule, such doubts would be a reason for respecting the District Court's exercise of discretion in making the express determination and direction under the amended Rule.

With the affirmative view generally prevailing in the Courts of Appeals, these courts are respecting the findings of the district courts, unless clearly erroneous. See above, pp. 24-28. For example, the Fifth Circuit—which has never expressly adopted the affirmative view of the amended Rule—in a case strikingly similar to this case, determined the merits of an appeal under the amended Rule. *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F.2d 891 (C.A. 5th 1954), *certiorari denied*, 348 U.S. 912 (1955). Moreover, it is clear that the Fifth Circuit does not consider itself conclusively bound by Rule 54(b) findings. See *e.g.*, *King* v. *California Co.*, 224 F.2d 193 (C.A. 5th 1955), in which the appeal was dismissed notwithstanding Rule 54(b) findings. See *Farmer* v. *Powers*, 204 F.2d 509 (C.A. 5th 1953).

The District Court expressly determined that in this case it would be unjust to delay the final determination of the sufficiency of Counts I and II. This deter-

mination is not challenged by petitioner. Apart from the technical reasons for such a determination, it is particularly appropriate where successive acts of business oppression are alleged and delay redounds to the benefit of the strong oppressor against a weak victim. Almost two and one-half years have passed since the complaint was filed. Various aspects of the case are pending in three courts: in this Court on the present review, in the Court of Appeals upon the merits of respondent's appeal and expressly in abeyance until the decision here, and in the District Court at issue on two counts. Even if petitioner is unssuccessful here, the case presumably will not proceed in the District Court until the legal sufficiency of Counts I and II is determined by the Court of Appeals.

As a matter of orderly administration, this case should be tried once. The District Court recognized this in making findings in accordance with the amended Rule; and the District Court is in the best position to make this determination. Nor will the determination of this appeal on the merits increase the number of appeals in this case. On the contrary, it may save one appeal. If on this appeal there is a determination of the sufficiency of the dismissed counts, the trial of the entire case will result in only one more appeal. On the other hand, if this appeal is dismissed, a trial on Counts III and IV will be followed by a second appeal which may require a subsequent trial of the dismissed counts and then a third appeal. See dissenting opinion of Mr. Justice Black in *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 185-186 (1955).

III. If the District Court's judgment is held to be interlocutory, the dismissal of Count I is appealable under Section 1292(1) as a refusal to grant an injunction.

Count I alleges that the several acts complained of were done for the purpose of disciplining all of petitioner's suppliers with intent to monopolize trade and commerce. Respondent invokes Sections 1 and 2 of the Sherman Act and Sections 3, 4 and 16 of the Clayton Act, among others (R. 2), and seeks injunctive relief. (R. 8.) The dismissal of Count I constituted a refusal of an injunction.

Section 1292 of the Judicial Code provides as follows:

> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions. . . ." 28 U.S.C. § 1292, 62 Stat. 929.

Accordingly, if this Court holds that the District Court's judgment is not appealable on pre-amendment standards and that the amendment to Rule 54(b) was not effective to make it appealable under Section 1291, the judgment is interlocutory and appellate jurisdiction exists under Section 1292(1). 6 Moore's Federal Practice, Second Edition (1953), p. 48.[41]

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[41] The Court need not concern itself with the conflict as to whether amended Rule 54(b) applies to cases under Section 1292(1), because here the findings under the amended Rule were made. Compare **Packard Motor Car Co. v. Gem Mfg. Co.**, 187 F. 2d 65 (C.A. 7th 1950) with **Cutting Room Appliances Corp. v. Empire Cutting Machine Co., Inc.**, 186 F. 2d 997 (C.A. 2d 1950), **Mow v. Republic of China**, 201 F. 2d 195 (C.A. D.C. 1952), and **Hook v. Hook & Ackerman, Inc.**, 213 F. 2d 122 (C.A. 3rd 1954). 6 Moore's Federal Practice, Second Edition (1953), p. 233.

CONCLUSION.

The judgment of the District Court finally disposed of two claims in a multiple claims case, leaving others for trial. The judgment is therefore appealable under Section 1291. The judgment would have been appealable under original Rule 54(b) and is therefore appealable under amended Rule 54(b), the requisite findings having been made. Even if not appealable under the original Rule, the judgment is appealable under the amended Rule. If it should be held that the judgment of the District Court is interlocutory, and therefore not appealable under Section 1291, it is appealable under Section 1292(1), as a refusal to grant an injunction.

The order of the Court of Appeals denying petitioner's motion to dismiss the appeal, should therefore be affirmed.

Respectfully submitted,

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